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No. 92-628

In The

Supreme Court of the United States

CYNTHIA AND DOUGLAS ANDREWS; CHAD M. ANDREWS by Cynthia and Douglas Andrews; CHRISTINE FALK; MICHAEL AND ROBIN FALK by Christine Falk; CHARLENE AND ROBERT KIRN; JENNIFER KIRN by Charlene and Robert Kirn; SHERRIE D. LaFEMINA; SHERRIE E. LaFEMINA by Sherrie D. LaFemina; JEFFERY AND KATHLEEN PRATT; JUSTIN AND JENNIFER PRATT by Jeffery and Kathleen Pratt; NANCY POLJACIK; JASON POLJACIK by Nancy Poljacik; DIANE LUCIA; TIFFANY AND FRANK LUCIA by Diane Lucia; WILLIAM TRACY; AND TYLER TRACY by William Tracy,

Petitioners,

v.

CHITTENDEN TOWN SCHOOL DISTRICT; VERMONT DEPARTMENT OF EDUCATION; ELIZABETH SOJOURNER; FRANCES LOVE; HARRIET THORNE; REV. DONALD BENEDICT; RICHARD CLARK; HUGH SHORT; AND JOHN VITA,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Free Exercise Clause of the First Amendment permits government to deny an educational benefit to otherwise eligible parents and children on the basis of the religious nature of a family's chosen private school?

2. Whether the Free Speech Clause of the First Amendment permits government to deny an educational benefit to otherwise eligible parents and children on the basis of the religious values, content, or viewpoint of the educational program offered by a family's chosen private school?

LIST OF PARTIES

The parties to the proceedings below were:

Plaintiff-Intervenors (Petitioners):

Cynthia and Douglas Andrews,
Chad M. Andrews by Cynthia and Douglas Andrews,
Christine Falk,
Michael and Robin Falk by Christine Falk,
Charlene and Robert Kirn,
Jennifer Kirn by Charlene and Robert Kirn,
Sherrie D. LaFemina,
Sherrie E. LaFemina by Sherrie D. LaFemina,
Jeffery and Kathleen Pratt,
Justin and Jennifer Pratt by Jeffery and Kathleen Pratt,
Nancy Poljacik,
Jason Poljacik by Nancy Poljacik,
Diane Lucia,
Tiffany and Frank Lucia by Diane Lucia,
William Tracy, and
Tyler Tracy by William Tracy

Plaintiff:

The Chittenden Town School District

LIST OF PARTIES – Continued

Defendant:

The Vermont Department of Education

Defendant-Intervenors:

Elizabeth Sojourner,
Frances Love,
Harriet Thorne,
Rev. Donald Benedict,
Richard Clark,
Hugh Short, and
John Vita

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Vermont in *Chittenden Town School District v. Vermont Department of Education*, No. 97-275, – A.2d – (Vt. 1999), 1999 WL 378244 (Vt.) (hereinafter "*Chittenden*"), entered on June 11, 1999.

OPINIONS BELOW

The opinion of the Supreme Court of Vermont in *Chittenden* has not yet been reported and is reprinted in the Appendix to this Petition, at App. 1. The June 27, 1997 opinion and order of the Rutland County Superior Court in *Chittenden Town School District v. Vermont Department of Education*, No. 20478-96 RcC (hereinafter "*Rutland*"), is not reported and is also reprinted in the Appendix to this Petition, at App. 64.

JURISDICTION

The Supreme Court of Vermont's judgment was entered on June 11, 1999. On August 11, 1999, this Court through Justice Ginsburg granted an extension of time for filing until and including October 9, 1999. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . . " U.S. CONST., AMD. 1.

The Vermont statutes at issue in this case, 16 V.S.A. §§ 166, 822-828, are reprinted in the Appendix to this

Petition at App. 116. Section 822 provides, in relevant part:

> (a) Each school district shall provide, furnish, and maintain one or more approved high schools in which high school education is provided for its pupils unless:
>
> > (1) The electorate authorizes the school board to close an existing high school and to provide for the high school education of its pupils by paying tuition in accordance with law. Tuition for its pupils shall be paid to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state[.]

STATEMENT OF THE CASE

For 130 years – long predating today's policy debates over "vouchers" and "school choice" programs – the State of Vermont has had in place a statutory tuition-reimbursement program for high school students whose local school districts do not operate a public high school. *See* 16 V.S.A. §§ 166, 822-828. Under Vermont's "tuitioning" statutes, local school districts are required to provide local students with a high school *education*, but need not do so through public *schools*. *See* 16 V.S.A. § 822.[1]

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[1] Maine operates a "tuitioning" program that is substantially similar to Vermont's. *See* 20-A M.R.S.A. §§ 2951, 5204(4). Maine's program, however, now excludes religious schools by statute. 1981 Me. Laws Ch. 693. Petitions involving Maine's program are currently pending before this Court. *See Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me. 1999), *petition for cert. filed*, 68 U.S.L.W. 3105 (July 22, 1999) (No. 99-163); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3129 (Aug. 12, 1999) (No. 99-254).

Vermont law permits school districts to meet this obligation in several ways, given that, in many small towns, it makes little sense for the local district to operate its own high school. Accordingly, state law permits a district to designate a public or private high school – one not managed or operated by the district – as its high school (with the designated school's consent). *See* 16 V.S.A. § 827. One district may also join with another to operate a school. *See* 16 V.S.A. §§ 701-723. Or, a district may pay tuition "to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state." 16 V.S.A. § 822(a)(1).

Before an "independent," or private, high school may participate in the tuitioning program, that school must be approved by the Vermont Board of Education. To secure approval, the school must: (1) offer elementary or secondary education; (2) provide a prescribed minimum course of study; and (3) "substantially" comply with Vermont Board of Education rules for approved independent schools. 16 V.S.A. § 166(b). These rules in turn require "that the school has the resources required to meet its stated objectives, including financial capacity, faculty who are qualified by training and experience in the areas in which they are assigned, and physical facilities and special services that are in accordance with any state or federal law or regulation." *Id.*; *see also Chittenden*, at App. 10 (n.5). Neither the controlling statute nor the Board of Education's rules say anything about the religious character or content of an independent school's educational program or seek in any way to regulate the content or viewpoint of that program. *See Id.* at App. 9, 10 (n.5).

Thus, Vermont's statutory tuitioning program on its face does not restrict eligible parents' and students' ability to choose any approved school – public or private, religious or secular – that they believe best meets their educational needs. Again, the controlling statute simply

provides that "[t]uition for its [the school district's] pupils shall be paid to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state[.]" 16 V.S.A. § 822(a)(1).

Notwithstanding the tuitioning program, most high-school-age Vermonters attend local public high schools. In 1995-1996, of the 290 school districts in the State, only 88 districts used the tuitioning program for some or all of their high school grades. During that same school year, these 88 districts tuitioned about 6,300 of Vermont's approximately 46,000 high school students.[2] One of these tuitioning districts, the Chittenden Town School District, is home to Petitioners and is therefore obligated under Vermont law to pay for the students' education.

Petitioners are parents and children who live in Chittenden, Vermont and who want their local school district to "tuition" the children to Mount St. Joseph, a Catholic high school in nearby Rutland.[3] Petitioners contend that the decision below violates their rights, under the Free Exercise and Free Speech Clauses of the First

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[2] *See Rutland*, at App. 66. In 1995-1996, of the 6,336 tuitioned students, 4,259 (67.2%) went to public schools and 2,077 (32.8%) attended private schools. During that year, 20 (31.2%) of Vermont's 64 tuition-approved independent schools appeared to be religiously affiliated.

[3] Mount St. Joseph is an approved Catholic school, owned by the Sisters of St. Joseph. *Rutland*, at App. 66. As the court below observed, "the record indicates that MSJ is a very good high school." *Chittenden*, at App. 5. Tuition in 1996-1997 ranged from $2,525 to $3,000 per year, well below the "tuitioning" rate for Vermont public high schools and also well below the approximately $5,000 it actually cost to educate a student at Mount St. Joseph. *Chittenden*, at App. 5-6, *Rutland*, at App. 66. Private donations, a small endowment, and the assistance of the Catholic Diocese of Burlington and several Rutland City Catholic parishes make up the rest of the cost.

Amendment, to enjoy on an equal basis the benefits of Vermont's tuitioning program and to select and attend a State-approved independent school without discrimination on the basis of the religious nature of the school or the religious viewpoint or content of its educational program.

In *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 641 A.2d 352 (1994), the Supreme Court of Vermont overruled *Swart v. South Burlington Town School Dist.*, 122 Vt. 177, 167 A.2d 514 (1961) (holding that payment of tuition to religious schools violated the Establishment Clause), and held that a parent was entitled to reimbursement from the school district for tuition the parent had paid to an out-of-state school, regardless of the school's religious character. *Campbell*, 641 A.2d at 361 ("[G]iving tuition reimbursement to this plaintiff will not offend the Establishment Clause[.]"). In light of *Campbell*, the Chittenden Town School District reasoned that parents and students who selected Mount St. Joseph were entitled to payment of tuition expenses. Accordingly, the District decided in May 1996 to treat approved independent schools equally and agreed to pay tuition for 15 Chittenden students who wished to attend Mount Saint Joseph.[4]

The Vermont Board of Education responded to this decision by terminating all general state aid to the District, citing its belief that the Constitution forbids paying tuition to religious schools. The District then brought a declaratory judgment action against the Commissioner and the Vermont Board of Education, seeking a ruling permitting the District to pay tuition without discrimination on the basis of the religion and seeking restoration of

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[4] Of the 95 high-school-age students that Chittenden was responsible to educate on September 1, 1996, 77 enrolled in five public high schools and 18 enrolled in four independent high schools. Three of those four private schools were non-religious.

general state aid. The Commissioner and the Vermont Board of Education counterclaimed that tuition payments to Mount St. Joseph would violate the United States and Vermont Constitutions and sought to enjoin the payments. Petitioners were permitted to intervene, as were various Chittenden taxpayers who oppose tuitioning to religious schools.[5]

PROCEEDINGS BELOW

On June 27, 1997, the Rutland Superior Court ruled that "tuition payments from a school district to pervasively sectarian high schools, or the parents of the children who attend, would have the effect of a direct subsidy to religious schools in violation of the United States and Vermont Constitutions." *Rutland*, at App. 114, 115.

Both sides appealed this ruling to the Supreme Court of Vermont.[6] On June 11, 1999, that court ruled that (1) providing tuition for children in religious schools – either via payment to the school or reimbursement to the parents – violates the Compelled Support Clause of Vermont's Constitution, VT. CONST. CH. 1, ART. 3, and (2) the exclusion of religious schools and parents who choose them from the tuitioning program's benefits does not violate the Free Exercise Clause. *Chittenden*, at App. 52, 53. The Vermont Supreme Court specifically declined to base its decision on the Establishment Clause, leaving undisturbed its 1994 holding in *Campbell, supra*, that the

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[5] After the decision of the Supreme Court of Vermont below, the School District abandoned its efforts to provide tuition for the families. The Chittenden Town School Board has not joined in this Petition.

[6] The State defendants cross-appealed the Superior Court's determination that the parents should be reimbursed if its decision were reversed. *See Rutland*, at App. 115.

First Amendment is not offended by a religion-neutral tuition-reimbursement program.

First, the Vermont Court concluded that tuition payments for students attending Mount St. Joseph would violate Chapter 1, Article 3 of the Vermont Constitution *Chittenden*, at App. 52, which provides that "no person ought to, or of right can be compelled to . . . support any place of worship[.]" *Id.* at App. 21. The Court specifically declined to hold that "any payment of public money to a religious school, for whatever reason, necessarily offends Article 3," *Id.*, at App. 23, and instead stated that "Article 3 is not offended by mere compelled support for a place of worship unless the compelled support is for the 'worship' itself[,]" *id.* The Court maintained, however, that payment of tuition for students attending Mount St. Joseph *would* "directly pay for religious instruction" because "we see no way to separate religious instruction from religious worship." *Id.* at App. 51.

The Court quite candidly admitted that, in its view, the constitutional problem was *not* "that education occurs in a religious school" but rather the *"content of that education."* *Id.* The court concluded:

> Thus, we conclude that the Chittenden School District tuition-payment system, with no restrictions on funding religious education, violates Chapter 1, Article 3. In expressing this conclusion, we think it appropriate to state what we have not decided. The major deficiency in the tuition-payment system is that there are no restrictions that prevent the use of public money to fund religious education. . . . Schools to which the tuition is paid by the district can use some or most of it to fund the costs of religious education, and presumably will.

Chittenden, at App. 52. In other words, otherwise eligible parents and students may not receive tuition benefits if

the student attends a religious school that provides religious instruction and integrates religious values and ideals into its curriculum, regardless of the overall quality of that school's instructional program. According to the court below, the State must treat differently two State-approved private schools based on the differing religious content of their educational programs.

Next, the court below went on to address Petitioners' claim that discrimination against approved religious schools in the tuitioning program violates the Free Exercise Clause and asserted, "[i]t plainly does not." *Id.* at App. 53. The court's analysis can be set forth in its entirety:

> The Free Exercise argument is premised on plaintiff's assumption that we would conclude that children who attend religious schools may not receive public educational funding, while children who attend public schools may. This is not our ruling. We have determined only that public funds may not pay for religious worship within the meaning of Article 3, wherever it occurs.
>
> Such a determination is in no sense at variance with bedrock jurisprudence relating to the Free Exercise Clause. The touchstone is "neutrality toward religion." . . . "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires," and a state is therefore precluded from "impos[ing] special disabilities on the basis of religious views or religious status." . . . Therefore, a statute may violate the Free Exercise Clause only if its "purpose or effect . . . is to impede the observance of one or all religions" and regardless of whether any such effect is direct or indirect. . . . Obviously . . . , the Free Exercise Clause may be implicated where the denial of a government

> benefit is the instrumentality. . . . However, unlike the unemployment benefits at issue in [*Sherbert v. Verner*, 374 U.S. 398 (1963)], denied to the plaintiff in that case because her religious beliefs prohibited her from working on Sundays, today's ruling requires no one "to choose between following the precepts of [his or her] religion and forfeiting benefits" that would otherwise be available from the government. . . .

Chittenden App. 53, 54. (citations omitted).[7]

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With the Decisions of Three Circuits of the United States Court of Appeals and Several Other Courts on the Question Whether the First Amendment Permits Government Officials To Exclude Persons from Educational-Benefit Programs on the Basis of Religious Belief, Identity, Expression, or Association.

This is a case about discrimination – discrimination against "religious ideas, religious people, [and] religious schools." *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment). Vermont provides an immensely valuable benefit – tuition – to eligible residents and their high-school-age children. Petitioners have been denied this educational benefit *solely* because they have chosen a religious school that includes religious

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[7] The Vermont Court did not separately address the claim that Respondents' discrimination on the basis of the school's religious content violated the Free Speech Clause. This argument was raised below by the Chittenden Town School District, Appellant's Opening Brief, at 26, and by Petitioners, Reply Brief of Plaintiff-Intervenor/Appellants, at 20-24.

instruction and values in its curriculum. As Petitioners discuss in more detail below, this discrimination – which is *not* required by the Establishment Clause[8] – violates the "equal treatment" principle at the heart of the Free Speech and Free Exercise Clauses of the First Amendment to the United States Constitution. *Id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment).

A. The Decision Below Conflicts with the Eighth Circuit's Decision in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

In *Peter*, two families with disabled children challenged their school districts' refusal to provide special-education services on the premises of the families' chosen religious schools. The school districts relied in part on a Minnesota State Rule that required districts to provide on-premises services (if a child's needs so indicate) at a public school or a private *non*-religious school but forbade provision of such services at a private *religious* school. Minnesota's distinction tracked exactly the line drawn by the Vermont Supreme Court in this case. The Minnesota Rule, in the Eighth Circuit's words, "explicitly discriminated against children who attended private religious schools." *Peter*, 155 F.3d at 996.

The Eighth Circuit concluded that such "[g]overnment discrimination based on religion violates the Free Exercise Clause of the First Amendment, . . . the Free

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[8] *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1985); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). *See also Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602, *cert. denied*, 119 S.Ct. 466 (1998); *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999); *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), *petition for cert. filed*, 67 U.S.L.W. 3671 (April 26, 1999) (Nos. 98-1716, -1718).

Speech Clause of the First Amendment, . . . and the Equal Protection Clause of the Fourteenth Amendment." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 830 (1995); and *Romer v. Evans*, 517 U.S. 620, 633 (1996)). The court also held that the Establishment Clause could not justify the discriminatory exclusion from an education-benefit program. *Peter*, 155 F.3d at 997. Minnesota's Rule therefore "violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement." *Id.*[9]

The conflict between *Peter* and the decision below is stark. Both cases involve provision of an education benefit to students attending private schools (in *Peter*, special education, and in this case, tuition). In both cases, the government discriminated, in the provision of the benefit, against students who attended *religious* private schools. In *Peter*, the Eighth Circuit found such discrimination unconstitutional under the Free Speech and Free Exercise Clauses, but here, the court below permitted the discrimination on the theory that the religious *content* of a school's instructional program justified the unequal treatment. The Vermont Court also held that the demands of the Free Exercise Clause were satisfied so long as students could receive tuition at "religious" schools where religious content was excised from the school's curriculum. *Chittenden*, at App. 53. It is difficult to imagine a

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[9] The Eighth Circuit went on to reverse the district court's grant of summary judgment against the families' constitutional claims, noting that the school district's stated policy of religious neutrality appeared to be a "mere pretext for religious discrimination." *Peter*, 155 F.3d at 997. The Eighth Circuit also reversed the district court's statutory ruling. On remand, the district court granted full relief to the families. *Westendorp v. ISD No. 273*, 35 F. Supp. 2d 1134 (D. Minn. 1998).

more explicit form of discrimination based against "religious ideas, religious people, or religious schools," *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and concurring in the judgment), or a clearer conflict than that which exists between the opinion below and the Eighth Circuit's opinion in *Peter v. Wedl*.

B. The Decision Below Directly Conflicts with the Sixth Circuit's Decision in *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995).

Hartmann involved restrictions contained in the Army's "Family Child Care" (FCC) program, "an on-base day care program that regulate[s] the placement of children, at their parents' choice and expense, in the homes of certain 'care providers' while their parents were performing military duties." *Id.* at 975. Several service members filed a lawsuit contending that regulations against religious activity in FCC providers' programs violated the First Amendment's Free Exercise and Free Speech Clauses. *Id.* at 978.

The district court granted the Army's motion for summary judgment. The Sixth Circuit reversed, noting that the regulations at issue were neither neutral nor generally applicable within the meaning of this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), and that the case was therefore controlled by this Court's observation in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *See Hartmann*, 68 F.3d at 979. Having concluded that the Army's regulations discriminated on the basis of religion, the Sixth Circuit found no compelling state interests that

might justify the exclusion of religious practices from day-care programs. *Id.* at 979-983.

In *Hartmann* – as in this case – the government discriminated on the basis of religion in the provision of an educational-assistance benefit. The Army's program indisputably provided servicemen and servicewomen with a benefit, in the form of convenient and subsidized day care, notwithstanding the fact that parents pay for the day-care services. *See Hartmann*, 68 F.3d at 976 (noting "large cost advantage for the FCC program"). The Sixth Circuit, in contrast with the court below, held that such discrimination violated the First Amendment. *Id.* at 979.

C. The Decision Below Directly Conflicts with the Fourth Circuit's Ruling in *Columbia Union College v. Clark*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 2357 (1999).

The Fourth Circuit held, in *Columbia Union College*, that Maryland had violated a private, religiously affiliated college's First Amendment rights by denying funding to the college under Maryland's "Father Sellinger" program. The Father Sellinger program was created in 1971 "to provide annual state-funded grants to qualifying private colleges, with the amount of funding to be determined by the number of full-time students attending the qualifying college." *Columbia Union College*, 159 F.3d at 154.

Maryland's Higher Education Commission had initially denied the College's application for Sellinger funds in 1992 on the ground that the school was "pervasively sectarian" because, among other things, "the college's religious mission permeated even its assertedly secular educational functions." *Id.* at 154, 155. The College reapplied for funds again in 1996, after this Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), but this request was also

denied, for the same reasons. *Columbia Union College*, 159 F.3d at 155.

The Fourth Circuit concluded that Maryland's refusal to provide Sellinger grants to Columbia Union – when it "fund[ed] a broad array of qualifying private colleges to encourage alternative sources of higher education," *id.* at 156 – "infringed on Columbia Union's free speech rights by establishing a broad grant program to provide financial support for private colleges that meet basic eligibility criteria but denying funding to Columbia Union solely because of its alleged pervasively partisan religious viewpoint." *Id.* The Court then remanded the case for further proceedings to determine whether the discrimination against the College was required by the Establishment Clause. *Id.* at 167-168.

The Vermont Supreme Court's analysis of Petitioners' Free Exercise claim conflicts squarely with the Fourth Circuit's reasoning in *Columbia Union College*. Just as Maryland infringed on First Amendment rights by singling out the College for special disadvantage on the basis of its alleged over-religiosity, so did Respondents violate the Constitution by refusing to pay tuition to Mount St. Joseph solely because of the authentic religious character of that otherwise-tuition-eligible State-approved private school.[10]

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[10] Although the Fourth Circuit remanded the case for further proceedings, this fact does not eliminate the conflict. The Fourth Circuit clearly held that the exclusion of the College from the Sellinger Program violated the College's First Amendment rights. It is *this* holding – which the remand does not undermine – with which the decision of the Vermont Court conflicts.

D. The Decision Below Presents Recurring and Unresolved First Amendment Issues of Profound National Importance on Which the Lower Courts are Divided and Confused.

The confusion in the courts about the First Amendment questions presented in this case reaches beyond the three decisions discussed above. At least four other lower courts have found, on varying grounds, that the Constitution presumptively forbids denial of education benefits to students on the basis of the religious nature, content, or viewpoint of the school the student attends – holdings in direct or implicit conflict with the Vermont Supreme Court's rejection of the First Amendment claims in this case – but nonetheless concluded the Establishment Clause *prohibits* equal inclusion in educational programs of persons attending religious schools. *See Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me. 1999), *petition for cert. filed*, 68 U.S.L.W. 3105 (July 22, 1999) (No. 99-163) (Equal Protection Clause forbids discriminatory exclusion on basis of religion from Maine's "tuitioning" program, but Establishment Clause requires the exclusion); *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3129 (Aug. 12, 1999) (No. 99-254) (rejecting Free Speech, Free Exercise, and Equal Protection challenges to same Maine program exclusion addressed in *Bagley*, primarily on the ground that the Establishment Clause requires the exclusion)[11]; *Zobrest v. Catalina*

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[11] Petitions for certiorari are pending before this Court in the *Bagley* and *Strout* cases, Nos. 99-163, 99-254. Because *Bagley* and *Strout* present questions that are related to, but distinct from, those raised in this Petition, we urge the Court to give serious consideration to granting review in one or both of the Maine cases *and* in the instant case. The Court would then have the opportunity to address both the Establishment Clause question (presented in *Bagley* and *Strout*, but not here, unless the respondent state officials choose to raise it) and the Free

Foothills Sch. Dist., 963 F.2d 1190, 1196-97 (9th Cir. 1992) (exclusion of students attending private religious schools from educational benefits otherwise available under a neutral program would violate the Free Exercise Clause if the Establishment Clause did not require exclusion), *rev'd, Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (reversing Ninth Circuit's Establishment Clause holding, but leaving in place the Ninth Circuit's Free Exercise Clause holding); and (4) *Miller v. Benson*, 878 F. Supp. 1209 (E.D. Wis. 1995) (Free Exercise Clause claim to equal inclusion of religious private schools in Milwaukee voucher program trumped by Establishment Clause), *vacated*, 68 F.3d 163 (7th Cir. 1995) (amendment to program to include religious private schools rendered Free Exercise challenge moot). The approach of these four courts conflicts squarely with that taken by the Vermont Supreme Court, which held that the Free Exercise Clause permits direct discrimination on the basis of religion even assuming that the Establishment Clause does not require it.[12]

Exercise question (squarely presented here, but dealt with only obliquely in *Bagley* and *Strout*) in a unified and coherent fashion. At minimum, if the Court chooses to review one or more of these three cases, it should hold or grant or vacate the petitions, and then remand the others for further consideration following the Court's opinion on the case or cases selected for review.

[12] Adding to the confusion, these four cases – *Bagley*, *Strout*, *Zobrest*, and *Miller* – do not agree on whether it is the Free Speech, Free Exercise, or Equal Protection Clause (or some or all of the above) that supplies and supports the affirmative claim to non-discrimination on the basis of religion in education programs. *Bagley* rejected the Free Speech, 728 A.2d at 146-147, and Free Exercise claims *id.* at 133-135, but held that discrimination on the basis of religion in such programs should trigger strict scrutiny under the Equal Protection Clause, *id.* at 136-138. *Strout* rejected all three claims, on the ground that the Establishment Clause requires it. 178 F.3d at 64-66. The Ninth

In a slight variant of the "Establishment Clause requires discrimination" theme of *Bagley*, *Strout*, and other decisions, the Supreme Court of Washington, like the court below, has held that the *state* constitution requires exclusion from educational programs on the

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Circuit in *Zobrest* found a presumptive Free Exercise Clause violation in the government's denial of an education benefit on the basis of attendance at a religious school, 963 F.2d at 1196, but concluded – in a part of the opinion reversed by this Court, *see* 503 U.S. at 13-14 – that the Establishment Clause required such discrimination. *Miller* likewise rejected a Free Exercise Clause claim on the ground that the Establishment Clause required the challenged discrimination. 878 F. Supp. at 1216.

Clouding matters even more, *Bagley* conflicts with *Peter* and *Hartmann* on the question whether exclusion from an education-benefit program violates the Free Exercise Clause; with *Peter* on whether such exclusion offends the Free Speech Clause; and with *Peter* and *Hartmann* on whether exclusion is required by the Establishment Clause. On this latter point, *Bagley* also conflicts with *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602, *cert. denied*, 119 S.Ct. 466 (1998) (Milwaukee educational-choice plan that included religious schools does not violate the Establishment Clause); *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999) (Cleveland school-choice program, which included religious schools, did not violate the Establishment Clause); and *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), *petition for cert. filed*, 67 U.S.L.W. 3671 (April 26, 1999) (Nos. 98-1716, 1718) (tax-credit program for donations to school-tuition organizations that grant scholarships to students at religious schools does not violate the Establishment Clause), but is in accord with the recent decision in *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725 (N.D. Ohio. 1999) (Cleveland voucher program violates Establishment Clause).

The courts in *Jackson*, *Goff*, and *Kotterman* did not have occasion to address the question presented here – whether the Free Exercise and Free Speech Clauses require equal treatment of families choosing religious schools – because the programs at issue did not discriminate against religious schools.

basis of religion, even if the Establishment Clause does not, and found such discrimination not to violate the Free Exercise Clause. *See Witters v. State of Washington Commission for the Blind*, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989) ("*Witters II*"). After this Court held, in *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), that it would not violate the Establishment Clause for the State to provide vocational-assistance grants to an otherwise eligible blind student attending a private bible college, the Supreme Court of Washington, on remand, interpreted its own "far stricter" constitution to ban the use of government-prog.am funds by an otherwise eligible recipient "for religious instruction." *Witters II*, 771 P.2d at 1121. The Washington Court also determined that this exclusion violated neither the Free Exercise Clause, *id.* at 1122, nor the Equal Protection Clause, *id.* at 1124.

In sum, the conflicts among these decisions are pervasive, yet they all present essentially the same matrix of issues:

First, as to whether the *Free Exercise* Clause (at least presumptively) forbids exclusion on the basis of religion from a government program, the decision below (Vt.), *Bagley* (Me.), *Witters II* (Wash. 1989), and *Strout* (1st Cir.) conflict *directly* with *Peter* (8th Cir.), *Hartmann* (6th Cir.), *Zobrest* (9th Cir.), and *Columbia Union* (4th Cir.).

Second, as to whether the *Free Speech* Clause (at least presumptively) forbids denial of an educational benefit solely because of the religious content of a student's chosen school, *Chittenden*, *Bagley*, and *Strout* say "no"; *Peter* and *Columbia Union* say "yes."

Third, as to whether the *Equal Protection* Clause (at least presumptively) forbids exclusion from an education-benefit program on the basis of religion, *Strout* says "no"; *Bagley* (involving the same program as *Strout*), *Peter*, and *Columbia Union* all say "yes."

Fourth, as to whether the *Establishment Clause* requires such discrimination, and therefore excuses these presumptive violations, the Eighth and Sixth Circuits say "no" (*Peter v. Wedl*; *Hartmann v. Stone*); the Vermont Supreme Court (*see Campbell v. Manchester Board of School Directors, supra*), along with the Wisconsin, Ohio, and Arizona Supreme Courts, says "no" (*see Jackson, Goff*, and *Kotterman*). On the other side, the Maine Supreme Judicial Court says "yes" (*Bagley*); the First Circuit says "yes" (*Strout*); the Ninth Circuit was reversed by this Court for saying "yes" (*Zobrest*); the Northern District of Ohio says "yes" (*Simmons-Harris v. Zelman*), and the Fourth Circuit says "yes, if the excluded school is 'pervasively sectarian' " (*Columbia Union College*).

This case sits at the crossroads of all of these conflicts. The decision below is in full accord with *Witters II* but in direct conflict with *Peter, Hartmann, Columbia Union, Zobrest*, and *Miller* on the Free Exercise issue. It conflicts with *Peter* and *Columbia Union* on the Free Speech question. Although the Vermont Court did not discuss the Equal Protection Clause, the court's reasoning conflicts, in its implications, with the interpretation of that Clause in *Peter, Columbia Union College*, and *Bagley*. The decision below is consistent in *result* with *Bagley* and *Strout*, but only because of the Establishment Clause holdings in those two cases, which themselves conflict with the rulings of the Vermont Supreme Court (in *Campbell*); the Wisconsin Supreme Court (*Jackson*); the Arizona Supreme Court (*Kotterman*); the Eighth Circuit (*Peter*); and the Sixth Circuit (*Hartmann*). Clearly, this Court's guidance is needed. *See Columbia Union College v. Clark*, 119 S.Ct. 2357, 2358 (1999) (Thomas, J., dissenting from denial of certiorari) (noting conflict between *Bagley* and *Strout*, on the one hand, and *Peter* and *Hartmann*, on the other, and urging this Court to provide the lower courts with "much needed guidance").

II.

The Decision Below Conflicts with This Court's Precedents Holding that the First Amendment Forbids Discriminatory Exclusion from a Government Program, Benefit, or Forum on the Basis of Religious Belief, Exercise, Affiliation, or Expression.

It is the bedrock principle of this Court's First Amendment jurisprudence that the government "may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); *see also, e.g., McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) ("[G]overnment may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits."). If the Free Exercise means anything at all, it means that government may not "discriminate[ ] against some or all religious beliefs or regulate[ ] or prohibit[ ] conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). As this Court said, long ago, in *Everson*, this non-discrimination rule is no less fundamental than the Establishment Clause's command that the government not require or subsidize religious observance:

> The First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Board of Education, 330 U.S. 1, 18 (1947).

It is similarly clear that the Free Speech Clause of the First Amendment does not permit the government to discriminate against religious speech. *See Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free*

School District, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Indeed, few constitutional propositions are more basic than the statement that, absent compelling justification, the government may not discriminate against or deny a benefit to a person because of the content of his expression. *Rosenberger*, 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). This rule applies with even greater force in cases that go "beyond mere content discrimination, to actual viewpoint discrimination." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

The Vermont Supreme Court's decision sanctions – indeed, it *mandates* – *precisely* this kind of unconstitutional discrimination against "religious ideas, religious people, [and] religious schools." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and concurring in the judgment). The State defendants below have singled out religious ideas, religious schools, and those who choose those schools for "special disabilities on the basis of religious views or religious status[.]" *Smith*, 494 U.S. at 876. If Petitioners had chosen an approved secular private school (or even a not-very-religious "religious" school), the State would have paid the tuition. But because Mount St. Joseph has incorporated the teachings and values of the Catholic faith into its programming – that is, because it chooses to engage in religious speech while providing an excellent general education – it suffers, for that reason alone, the penalty of exclusion from the tuitioning program. And parents and children decide to transmit or express their own religious commitments and values by selecting a school like Mount St. Joseph's – that is, if they choose to engage in religious expression – the same penalty will be exacted from them.

Petitioners respectfully submit that the decision below not only conflicts with the better-reasoned opinions of this and other courts, it also undermines core First

Amendment values. Religious expression – including choosing to educate one's child in a religious tradition – has long been valued, not feared, in our constitutional tradition. Directing and supervising children's education is perhaps the most important and personal First Amendment activity most people ever exercise. Indeed, for many low-income parents, choosing how to educate their children may be one of the few available vehicles for expressing publicly their beliefs about matters of ultimate concern. Vermont's unjustified exclusion of religious schools from its tuitioning program effectively precludes low-income parents from enjoying the fulfillment and satisfaction such expression brings. *See generally,* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto,* 63 U. CHI. L. REV. 937 (1996).

A. The Decision Below Conflicts with *Rosenberger v. Rectors and Visitors of the University of Virginia,* 515 U.S. 819 (1995).

In *Rosenberger,* this Court held that the First Amendment forbids a state university from discriminating on the basis of religious viewpoint in its funding of student publications. The University of Virginia had a policy of paying the printing costs for a wide range of student publications out of the University's "Student Activities Fund." It had refused, however, to pay the costs for "Wide Awake," a Christian campus paper, "for the sole reason that [the paper] primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Rosenberger,* 515 U.S. at 822 (quotation omitted).

Insisting that "[i]t is axiomatic that the government may not regulate speech based on its substantive content" and that "[d]iscrimination against speech because of its message is presumed to be unconstitutional[,]" *id.* at 828, the Court held the University's refusal to pay "Wide Awake"'s costs violated the First Amendment. As this

Court observed, the University had "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. This Court concluded that the University's discriminatory policy was a "denial of ["Wide Awake" 's] right of free speech guaranteed by the First Amendment." *Id.* at 837. This Court then went on to hold that the University's discriminatory action was neither required nor excused by the Establishment Clause, proclaiming that the University's unequal treatment "was a denial of the right of free speech and [risked] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-846.

The decision below cannot be reconciled with *Rosenberger*.[13] Just as the University of Virginia excluded "Wide Awake" from an otherwise available government benefit – payment of printing costs – solely because of the paper's religious character, Respondents excluded Petitioners from an otherwise available benefit – neutral government funding of tuition costs, when a school district

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[13] The *Rosenberger* Court relied on *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981). The Vermont Court's decision conflicts with these earlier precedents just as it does with *Rosenberger*. *See Lamb's Chapel*, 508 U.S. at 394 (school district violated the Free Speech Clause when it denied access to school premises to a church group because "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *Widmar*, 454 U.S. at 269 (public university's refusal to grant religious student groups the same access to university facilities that was provided to other, non-religious, student groups violated the First Amendment). In *Widmar* and *Lamb's Chapel*, as in this case, the government attempted to exclude particular individuals and institutions from a benefit – *i.e.*, access to a forum or program – because of the religious character of those individuals' and institutions' speech and activities.

does not operate its own high school – entirely because of the religious character of Petitioners' chosen school.[14]

B. The Decision Below Conflicts With This Court's Decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

In *Lukumi*, this Court invalidated city ordinances that prohibited religiously motivated animal sacrifice by adherents of the Santeria religion. The Court said that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." 508 U.S. at 532; *accord Employment Div. v. Smith*, 494 U.S. at 877 (government "may not . . . impose special disabilities on the basis of religious views or religious status").

In the instant case, no less than in *Lukumi*, the government action at issue discriminates on the basis of religion. *See Peter*, 155 F.3d at 996-998; *Hartmann*, 68 F.3d at 978-979 (following and applying *Lukumi* to invalidate religion-based discrimination in education and child-care programs). In general, Vermont parents who live in tuitioning towns may send their children to approved private high schools at public expense. Parents who choose religious schools, however, are denied this public

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[14] *Rosenberger* also conflicts with the decision below in that, in *Rosenberger*, the University paid printing costs for newspapers that talked "about religion," but not for newspapers that were actually "religious." *See* 515 U.S. at 825, 831. It was *precisely* because the University discriminated against papers that expressed religious belief that this Court condemned the University's policy as unconstitutional viewpoint discrimination. *Id.* at 831. Similarly, the decision below requires discrimination only against schools that go beyond mere religious affiliation and that actually practice, teach, and believe their faith. *Chittenden*, at App. 51.

benefit *precisely* because of the religious nature of their choice. The judgment below thus conflicts directly with the most central principle of the Free Exercise Clause, as stated in *Smith* and *Lukumi*.

C. The Decision Below Conflicts With *McDaniel v. Paty*, 435 U.S. 618 (1978).

McDaniel presented the question whether a Tennessee statute barring "Minister[s] of the Gospel, or priest[s] of any denomination whatever" from serving as delegates to the State's constitutional convention violated the Free Exercise Clause. 435 U.S. at 620. This Court noted that Tennessee extended to its adult citizens generally the right to seek and hold office as delegates, and observed that by denying that right to clergy "the State ha[d] conditioned the exercise of one [right] on the surrender of the other." *Id.* at 626. The Court stated emphatically: "In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion." *Id.*

Justice Brennan's concurrence drove home the point even more forcefully. He highlighted the fact that the Tennessee disqualification "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." 435 U.S. at 632 (Brennan, J., concurring). He noted that the Tennessee statute "requires appellant's disqualification solely because he is a minister of a religious faith. If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy." *Id.* at 634 (Brennan, J., concurring). After emphasizing the neutrality principle that is at the heart of the First Amendment's Religion Clauses, Justice Brennan insisted that "government may not use religion as a basis of classification for the imposition of

duties, penalties, privileges or benefits." *Id.* at 639 (Brennan, J., concurring).

The decision below is inconsistent with this Court's reasoning and holding in *McDaniel* and with the equality principles expounded in Justice Brennan's concurrence. Vermont has done precisely what Justice Brennan observed government may *not* do. Having decided to operate a tuitioning program, it has "use[d] religion as a basis of classification" in the administration of that program and "impose[d] a unique disability" on otherwise eligible beneficiaries who choose religious schools. Even worse, Vermont has, like Tennessee did in *McDaniel*, communicated to Petitioners and other parents that the price of enjoying a benefit generally available under Vermont law – a government-financed high school education at a private school where a school district does not maintain its own public school – is giving up the right to attend an authentically religious school.

D. The Decision Below Cannot Be Reconciled With This Court's Establishment Clause Decisions Forbidding Discrimination *Among* Religions or Varieties of Religious Expression.

As this Court observed in *Larson v. Valente*, 456 U.S. 228 (1982), laws and programs that distinguish *among* or *between* religions, or that treat one religion or religious belief more favorably than another, violate the very core of the Establishment Clause: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244; *see also, e.g., Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (government may not "prefer one religion over another"); *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("no favoritism among sects"). Thus, in *Larson*, this Court struck down, as a violation of the Establishment Clause, a Minnesota exemption for some religious organizations, but not

others, from various registration and reporting requirements contained in the State's charitable-contributions statute. 456 U.S. at 255.

This Court has time and again re-affirmed the requirement of government neutrality toward different denominations and religious faiths. In *Board of Ed. Of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994), for example, this Court struck down a New York law that authorized the creation of a separate school district for the Village of Kiryas Joel, whose residents are all Satmar Hasidim, in part because the law "g[ave] reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups." 512 U.S. at 702. This Court was concerned, in other words, with "legislative favoritism along religious lines[.]" *Id.* at 704. Likewise, in striking down the animal-sacrifice restrictions at issue in *Lukumi*, the Court relied in part on the fact that the restrictions targeted the practices of one religion, but were carefully crafted to permit the arguably similar practices of another faith. *Id.* at 535-536, 538-539.

The decision of the Vermont Court is in serious tension with *Larson* and the rest of this Court's "no denominational preference" cases. The court below did not rule out tuition payments to *all* religiously affiliated schools, *see Chittenden*, at 52, but only to those schools that incorporate too much "religious instruction" into their curriculum. *Cf. Widmar*, 454 U.S. at 269 n.6 (distinction between religious speech and religious "worship" "would tend inevitably to entangle the State with religion"). The Supreme Court of Vermont has quite literally created discrimination *among* religious schools, based on "how religious" they are.

III.

The Questions Presented Are of National Importance and Affect Education-Reform Efforts Across the Nation

Although Vermont has been a pioneer in providing educational opportunities to its children and educational choices to its parents for over a century, the constitutional questions presented in this case have broad significance for the important and ongoing national debate on educational reform. Across the Nation, from Arizona to Florida, States are acting boldly in the best experimental tradition of our constitutional federalism to enact a variety of charter-school, tax-credit, school-choice, and other educational-reform programs. Unfortunately, these initiatives have often been hamstrung and delayed by baseless Establishment Clause challenges that reflect policy disagreements more than sound constitutional doctrine.

This Court has, in recent years, done much to clarify that the First Amendment does not require hostility toward religion. When the independent choices of citizens direct government benefits to religious institutions according to religion-neutral criteria, there is no violation of the Establishment Clause.[15] But, lower courts' inconsistent conclusions regarding the constitutionality of educational-reform programs which appear to satisfy this Court's recent clarifications impedes innovative policy experimentation.[16] Still, States and local governments

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[15] *See Agostini v. Felton*, 521 U.S. 203 (1985); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

[16] *Compare, e.g., Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999) (Cleveland voucher program did not violate Establishment Clause), *with Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 741 (N.D. Ohio 1999) (revised Cleveland

continue to press forward with choice-based reforms, even as they await definitive resolution by this Court of the First Amendment questions surrounding the crucial role of religious schools in making these reforms work.[17] The hope for these and other educational-reform efforts depends on a clear ruling from this Court that (1) such initiatives are consistent with the Establishment Clause's neutrality mandate and (2) educational-choice programs

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program violated Establishment Clause), *Simmons-Harris, et al. v. Zelman*, No. 99-CV-1740, 1999 WL 669222 (Aug. 27, 1999) (staying effect of ruling pending final ruling on injunctive relief). *See* William Claiborne, "Cleveland's School Voucher Program Halted," Washington Post (Aug. 25, 1999), at A2; "Judge Reverses School Voucher Ruling," Washington Post (Aug. 28, 1999), at A6. *See also Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602, 619 (upholding Milwaukee school-choice program that "place[d] on an equal footing options of public and private school choice"), *cert denied*, 119 S.Ct. 466 (1998), *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), *petition for cert. filed*, 67 U.S.L.W. 3671 (April 26, 1999) (Nos. 98-1716, 1718) (upholding tax-credit program for donations to organizations that grant scholarships to students at religious schools).

[17] *See generally, e.g.*, Nicole Bondi, "Appointee Backs School Choice," Detroit News (Sept. 23, 1999); Jabeen Bhatti, "Roanoke to Start First Charter School; Gilmore Lauds 'Choices' for Virginians," Washington Times (Sept. 11, 1999); John Mooney, "N.J. Begins Test Phase on Choice for Schools," Newark Star-Ledger (Sept. 2, 1999); Jennifer Barrett, "School Choices Lure Students," Arizona Republic (Aug. 17, 1999); Frank Reeves and Peter J. Shelly, "Ridge Fails on Vouchers," Pittsburgh Post-Gazette (June 18, 1999), at A1; R.A. Dyer, "Voucher Bill Killed Again in Legislature," Fort Worth Star-Telegram (June 6, 1999), at A1; Lois Fecteau, "Vouchers Fall Flat in Voting," Albuquerque Journal (May 10, 1999), at A1; "Teachers Sue Bush Over Voucher Programs," Florida Times Union (Jacksonville) (July 31, 1999), at B8; Rob Hotakainen, "State Talks Up New Education Tax Credits," Star Tribune (Minn.-St. Paul) (July 23, 1998), at 1B.

may not discriminate against religious schools and expression.[18]

CONCLUSION

For all the foregoing reasons, we urge this Court to grant the requested Petition for Certiorari and to resolve the constitutional questions presented in this case in favor of equal treatment.

Respectfully submitted,

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[18] This Court has already granted *certiorari* in *Mitchell v. Helms*, 151 F.3d 347 (1998), *cert. granted*, 119 S.Ct. 2336 (June 14, 1999) (No. 98-1648). Mitchell involves important Establishment Clause issues that will certainly shape the education-reform debate but it does not present the important Free Exercise and Free Speech questions raised by Petitioners here.

No. 97-275

Chittenden Town School District and Cynthia Andrews, et al., Intervenors

v.

Vermont Department of Education and Elizabeth Sojourner, et al., Intervenors

Supreme Court On Appeal from Rutland Superior Court

March Term, 1998

(Filed Jun. 11, 1999)

Alden T. Bryan, J.

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Mitchell L. Pearl of Langrock Sperry & Wool, Middlebury, and Joel D. Cook, Vermont-NEA, Montpelier, for Defendants-Intervenors-Appellees Elizabeth Sojourner, et al.

A. Jeffrey Taylor, Rutland, Martin S. Kaplan and Stephen A. Jonas of Hale and Dorr LLP, Boston, Massachusetts, and Lisa Thurau, New York, New York for Amicus Curiae National Committee for Public Education & Religious Liberty.

PRESENT: Dooley, Morse and Johnson, JJ., and Allen, C.J. (Ret.) and Gibson, J. (Ret.), Specially Assigned

DOOLEY, J. In this declaratory judgment action, we are again called upon to consider the constitutional implications of the Vermont statutes authorizing school districts to provide high school education to their students by paying tuition for nonpublic schools selected by their parents. See 16 V.S.A. §§ 822 and 824. In *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 644 A.2d 352 (1994), we concluded that the Establishment Clause of the United States Constitution was not an impediment to the reimbursement at public expense of tuition paid to a sectarian school in the circumstances of the case then presented. See *id.* at 447-48, 456, 641 A.2d at 356-57, 361 (overruling our prior holding to the contrary in *Swart v. South Burlington Sch. Dist.*, 122 Vt. 177, 167 A.2d 514 (1961)). Today we confront a question explicitly reserved in *Campbell*, see *id.* at 447-48 n. 5, 641 A.2d 352, 641 A.2d at 356 n. 5: whether the tuition reimbursement scheme transgresses the Compelled Support Clause of the Vermont Constitution, Vt. Const. Ch. I., art. 3, which speaks not to establishment of religion but to state support of religious worship. The superior court ruled in favor of the Department of Education and the intervenors aligned with the department, basing its analysis on the federal Establishment Clause. We focus on the Vermont Constitution and conclude that a school district violates Chapter I, Article 3 when it reimburses tuition for a sectarian school under § 822 in the absence of adequate safeguards against the use of such funds for religious worship. Because of

the absence of such safeguards in this case, we affirm the judgment of the superior court.

I. Background

The case was submitted to the superior court on stipulated facts, which we summarize in relevant part. Plaintiff Chittenden Town School District has ninety-five students in grades nine through twelve. It does not maintain a high school for the education of these secondary students. Instead, it pays tuition to public high schools or approved independent schools for this purpose, as explicitly authorized by 16 V.S.A. § 822. Pursuant to §§ 822(a)(1) and 824(b), parents of the students may select an approved school to which to send their children.

Until the 1996-97 school year, the Chittenden School Board authorized tuition payments only for public high schools or approved secondary schools that it found to be nonsectarian. In the 1995-96 school year, it paid tuition for seventy-five secondary school students. Of these, seventy-two attended one of the five public high schools operating in Rutland County, and three attended approved private secondary schools.

In December of 1995, the Chittenden School Board adopted a new secondary-education tuition-reimbursement policy that would allow tuition to be paid to sectarian schools. One approved independent sectarian secondary school operates in Rutland County. That school is Mount Saint Joseph Academy (MSJ), a parochial high school located in the City of Rutland. MSJ is owned and operated by the Sisters of Saint Joseph, under the authority of the Roman Catholic Diocese of Burlington. MSJ is

an institution in which the secular and sectarian aspects of its educational program are intertwined. Its statement of philosophy reveals that its academic program incorporates religious and moral education through a broad range of curricular and co-curricular activities and that "[w]e believe that learning occurs in an atmosphere where faith and community are emphasized and overtly practiced. . . . "

Consistent with its educational philosophy, MSJ requires instruction in theology, constituting four of twenty-three credits required for graduation. The four theology courses are entitled "Salvation History," "Sacraments," "Ethics" and "Commitment." The description of the theology curriculum at MSJ states:

> During a four year period, the development of spirituality is found through liturgy, prayer, retreat and experiential learning activities. . . . Through the historical and biblical study of our faith roots, presentations, and discussions on the Gospels and lives of Christian leaders, students build a foundation for the development of their individual spiritual lives.

Among the expected outcomes of the theology education and the religious life activities of the school are that the students will "witness a sense of Catholic identity" and will "continue to proclaim the Gospel of Jesus and work towards fulfilling the kingdom through service/ministry/action . . . ."

The MSJ school day begins with a prayer, to which all students are required to give quiet attention. Once a month, the entire school attends a celebration of the Roman Catholic mass led by a priest. Non-Catholics must

attend, but are not required to participate in the sacrament. All students must attend annual spiritual retreats, which include prayers and a mass. All students must attend a twice-annual celebration of the sacrament of reconciliation; participation in the sacrament is not required.

MSJ faculty are required to adhere to Catholic doctrine in their teachings and must demonstrate and exemplify the values of the Catholic faith by striving to live and teach the Gospel messages of Jesus. The principal of MSJ is a Roman Catholic nun. Of the twenty-seven teachers, four are nuns or priests.

Although we have been required by the issue before us to examine the sectarian aspects of education at MSJ, we emphasize that the record indicates that MSJ is a very good high school. Ninety-one percent of MSJ's class of 1996 went on to college. In recent years, the percentage has been 83% to 93%. Of the 206 students enrolled in MSJ for the 1996-97 school year, 164 were Roman Catholics and the remainder were of different faiths.

In May 1996, the Chittenden School Board specifically approved payment of tuition to MSJ. Fifteen Chittenden students were enrolled in MSJ for the 1996-97 school year.

The Chittenden Town School District funds secondary education through a combination of revenues raised by the local property tax and aid to education received from the State of Vermont. For the 1996-97 school year, it intended to use $39,000 in public funds to pay tuition at MSJ. MSJ has a three-tiered tuition policy, charging $3,000 annually to non-Catholics; $2,775 to Catholics who reside

in the Diocese, but not in the City of Rutland; and $2,525 to Catholics who reside in the City of Rutland. MSJ projected its per-pupil cost of education at $5,021 for 1996-97. The Diocese and local Rutland parishes would make up the bulk of the difference.

When the Chittenden School Board voted to allow tuition reimbursement to MSJ, the Commissioner of Education terminated state aid to education to the district. The Chittenden Town School District then brought this action against the Commissioner and the Vermont Department of Education, asserting, among other claims,[1] that tuition reimbursement to MSJ was constitutional and seeking an order to restore state-aid funding. Defendants counterclaimed that the Chittenden decision to make tuition payments to MSJ violated the Establishment Clause of the First Amendment to the United States Constitution and Chapter I, Article 3 of the Vermont Constitution. They also sought an injunction.

The superior court authorized two groups of intervenors. One group, aligned with plaintiff, consists of parents who are sending children to MSJ for secondary education and seek payment of the MSJ tuition by the Chittenden Town School District. The other group,

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[1] The original complaint contained other claims but these were dismissed with prejudice and neither plaintiff nor the intervenors aligned with plaintiff have appealed the dismissal. Plaintiff also claimed that defendants' actions violated the Religious Freedom Restoration Act. The superior court declined to address this claim because of the decision of the United States Supreme Court in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), striking down this act. Plaintiff and plaintiff-intervenors have not raised the Religious Freedom Restoration Act on appeal.

aligned with defendants, consists of residents of the Town of Chittenden who oppose the use of their state and local tax payments to fund sectarian education.[2]

On October 17, 1996, the superior court entered a temporary order based on the stipulation of the parties. The temporary order prohibited the Chittenden Town School District from making any tuition payments to MSJ and required the Department of Education to continue to make state-aid-to-education payments to the district. On June 27, 1997, the superior court issued its opinion and order, concluding that "tuition payments from a school district to pervasively sectarian high schools, or the parents of the children who attend, would have the effect of a direct subsidy to religious schools in violation of the United States and Vermont Constitutions." The court granted defendants' motion for summary judgment and continued the temporary order pending appeal. It held, however, that if this Court reversed its decision, it would order the State to reimburse the Chittenden parents for tuition already paid to MSJ.

Plaintiffs have appealed from the court's decision, contending that (1) tuition payment to sectarian schools does not violate either the United States Constitution or the Vermont Constitution as long as it is based on a

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[2] For the sake of convenience, we hereafter refer to plaintiff and the intervenors aligned with it collectively as plaintiffs, and to defendants and their aligned intervenors as defendants. We also note that MSJ is not a party to this case and thus cannot be required to "demonstrate that its curriculum does not involve the propagation of religious beliefs," as argued by the concurrence.

parent's free choice of educational provider, and (2) exclusion of sectarian schools from reimbursement violates the Free Exercise Clause of the First Amendment to the United States Constitution. Defendants have responded that Chittenden's tuition-reimbursement policy violates both applicable constitutions and that exclusion of reimbursement for sectarian schools does not violate the United States Constitution. Defendants have cross-appealed the superior court's decision to order tuition reimbursement in the event its main holding is reversed.[3]

As we analyze the dispute before us, we cannot but share the feelings of Chief Justice Williams of this Court, who in 1834 wrote the first decision interpreting Article I, § 3 of the Vermont Constitution. The question was whether this Court would enforce a contract made on the Sabbath. Chief Justice Williams found that the question was clearly resolved by "principles of law which have been known, acknowledged, and never controverted," but added:

> We are aware, however, that the subject under consideration is one which is liable to be viewed too much on either side through the medium of feeling; and any judicial investigation of it may be regarded as treading upon forbidden ground. A decision one way may be regarded as promoting irreligion, licentiousness and immorality; and a decision the other way be considered as encroaching upon religious freedom.

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[3] Because of our disposition of this case, we do not reach the cross appeal.

Lyon v. Strong, 6 Vt. 219, 221 (1834). Over one hundred and sixty years later, the background of this case is similar. We emphasize that this is not a decision about the value of religious education or of education about religion. From what we can determine on this limited record, religious education is thriving in this state and providing a high quality education to many students. Nor is this a decision about the value of parental choice in determining where and how children will receive education services. Whether parental choice improves the quality of education for some or all students must be determined by the executive and legislative branches, not this Court. Our challenge is to apply legal principles derived from the Vermont and/or United States Constitutions to determine whether governmental payment for religious education is constitutional if parents have free choice to send their children to any approved educational institution, public or private, secular or sectarian.

II. Overview of Statutory Scheme

Before reaching the constitutional questions, we find it helpful to look at the controlling statutes. The basic scheme is quite simple. Since the Chittenden Town School District provides elementary education, it is required to provide secondary education. See 16 V.S.A. § 822(a). It has a number of options in meeting this obligation. The two main ones are to maintain a public high school or to pay tuition "to an approved public or independent high school, to be selected by the parents or guardians of the

pupil, within or without the state." *Id.* § 822(a), (b).[4] Chittenden has taken the second of these options.

The approval for public or independent high schools is given by the Vermont Board of Education. To become an approved independent school, the school must: (1) offer elementary or secondary education; (2) provide a prescribed minimum course of study; and (3) "substantially" comply with Vermont Board of Education rules for approved independent schools. 16 V.S.A. § 166(b). The rules must at a minimum require "that the school has the resources required to meet its stated objectives, including financial capacity, faculty who are qualified by training and experience in the areas in which they are assigned, and physical facilities and special services that are in accordance with any state or federal law or regulation." *Id.*[5]

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[4] The school district does have other options, not relevant here. For example, it can designate a private or public high school, not managed by it, as its high school. See 16 V.S.A. § 827(a). It can join a union school district to operate a high school with other districts. See *id.* §§ 701-23. In certain circumstances, the district can maintain a high school and tuition some students to a public or private high school. See *id.* § 822(c).

[5] In addition to the requirements of the statute, the Board's rules require that the school: (1) offer a minimum course of study that is age and ability appropriate; (2) have support services – library, administrative, guidance and counseling services and a system of records to assess student progress – necessary to meet the requirements of a minimum course of study and the educational objectives of the school; (3) have classrooms, laboratory, library and other facilities necessary to operate its program; (4) have an adequate program of continuing professional staff development; (5) have a sufficient

Neither the statute nor the rules deal with sectarian education. As discussed below, the exact tuition reimbursement scheme adopted by the Chittenden Town School District became unlawful after this Court's decision in *Swart*, but:

> The Legislature took no action to implement that decision, leaving the school districts in the same position today as they were in 1961. Although the relevant statutes allow school districts to pay tuition on behalf of a resident who is a student in any approved private school, the districts must determine whether such a payment violates the Establishment Clause.

Campbell, 161 Vt. at 447, 641 A.2d at 356. Thus, neither the statute nor the rules deal with the religious part of the curriculum of a sectarian school. They impose no limit on the quantity and nature of sectarian subjects; nor do they require that sectarian education be separated from secular education. It is entirely possible that the majority of the education in an approved independent school will be in religious tenets and doctrine.[6]

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number of professional staff; (6) satisfy legal requirements on facilities, fire drill, and immunization of students; (7) maintain a register of daily attendance of each pupil and report enrollment according to law; and (8) maintain an operating schedule that includes a total number of instructional hours that are not less than those of a public school. Vermont Bd. of Educ., Manual of Rules and Practices § 2226.1 – 2226.11 (1997), reprinted in 3 Code of Vt. Rules 22000004-5 (1997).

[6] Of the sixty-five independent schools approved by the Vermont Board of Education, four are identified as "7th Day Adventist" schools and three are identified as "Christian" schools. Many of the remainder, like Mount Saint Joseph Academy, appear to be parochial schools.

Nor do the tuition payment statutes impose any real limits. The sending district must pay the full tuition rate of any independent school meeting public school standards. 16 V.S.A. § 824(b). If the independent school does not meet public school standards, the tuition payment for a high school student cannot exceed "the average announced tuition of Vermont union high schools for students in grades 9-12 for the year" or such higher rate as is voted by the electorate of the sending district. *Id.* Although the term "tuition" is not defined, we see nothing in the statutory scheme to suggest that it is other than the rate charged by the approved independent school for whatever educational services it delivers. Thus, the cost of purely religious education can be included in the tuition payment made to a sectarian school.

We do not mean to suggest that our present inquiry implicates the ability of a sectarian school to charge tuition for religious education, rather than requiring that the cost of such education be borne by voluntary donations of religious adherents. This is a policy choice of the religious school. However, for reasons discussed fully below, we deem it highly relevant that, in the absence of any kind of regulatory process, the tuition payment system adopted by the Chittenden Town School District can, and presumably will, expend public money on religious education as long as some undetermined percentage of the money funds education on secular subjects required in the state's minimum course of study. The stipulated facts indicate that this is happening at MSJ. Apparently, the public and private sources of revenue are commingled so that each supports religious education.

In reviewing the statutory scheme, we are also making a point about the nature of this case. The factual record made by the parties shows, at best, some examples of how Chittenden's tuition reimbursement policy might be used, but the record also demands a broader inquiry. See *Robtoy v. City of St. Albans*, 132 Vt. 503, 504, 321 A.2d 45, 46-47 (1974) (function of declaratory judgment is to resolve "actual or justiciable controversy" involving results that are "reasonably to be expected"). The stipulated facts show that the Chittenden Town School District intends to pay tuition to any qualifying secondary school, sectarian or secular, selected by the students and parents. As it happens, the only sectarian school now selected by Chittenden parents and students is MSJ, but no party is suggesting that this decision will not govern if a student selects another religious school. Therefore, this case is not about MSJ or any other parochial school as such. We are called upon to decide whether a tuition reimbursement policy that allows tuition to be paid to *any* "approved public or independent high school" is constitutional, because the Department of Education may reasonably expect the Chittenden Town School District to reimburse tuition for all such schools. In examining the statutory scheme, we are therefore looking at which schools *could* meet the standards for this designation and receive tuition reimbursement if selected by parents and children.

III. Chapter I, Article 3 of the Vermont Constitution

Defendants argue that the Chittenden tuition payment policy violates both the federal and Vermont

constitutions, and the superior court accepted both claims. In *Swart*, this Court chose to analyze a virtually identical case under the First Amendment because the federal law was clear, and the Court was uncertain of the outcome under Chapter I, Article 3 of the Vermont Constitution. The federal law has become less clear. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 209, 2016-17 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) and holding that federally funded instruction at sectarian schools is permissible under Establishment Clause in at least some circumstances); see also *Simmons-Harris v. Goff*, No. 97-1117, slip op. at 18 (Ohio May 27, 1999) (sustaining, in part, on Establishment Clause grounds a voucher program that includes sectarian schools); *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis.1998) (concluding that choice plan that includes religious schools does not offend Establishment Clause), cert. denied, 119 S.Ct. 466 (1998); but see *Strout v. Albanese*, No. 98-1986, 1999 U.S. App. Lexis 10932 at *19-20 (1st Cir. May 27, 1999) (reaching opposite conclusion in context of tuitioning plan explicitly excluding parochial schools); *Bagley v. Raymond Sch. Dep't*, No. 98-281, 1999 WL 236464 at *43-44 (Me. Apr. 23, 1999) (same).

We are the final judicial interpreters of the Vermont Constitution, see *State v. Read*, 165 Vt. 141, 153, 680 A.2d 944, 951 (1996), and our fundamental charter is a free-standing document, see *Hodgeman v. Jard Co.*, 157 Vt. 461, 464, 599 A.2d 1371, 1373 (1991). Therefore, as we pointed out in *State v. Badger*, 141 Vt. 430, 449, 450 A.2d 336, 347 (1982), when faced with a choice between deciding a constitutional case on state grounds – yielding a final

answer in the form of "adequate and independent state grounds to support our judgment" – and a construction of the federal constitution that faces an uncertain future given the state of applicable federal principles, our duty is to choose the former course of action. "If our state constitution is to mean anything, it must be enforced where it is the only law capable of providing a final answer to a claim and a party [who] . . . has invoked its protections." *Id.* Accordingly, we decide this case based solely on the Vermont Constitution and, since it is dispositive, need not consider whether the Establishment Clause of the First Amendment would also prohibit the tuition reimbursement policy at issue here.

Article 3 provides:

> That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be *compelled to* attend any religious worship, or erect or *support any place of worship*, or maintain any minister, *contrary to the dictates of conscience*, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of

> religious worship, which to them shall seem most agreeable to the revealed will of God.

Vt. Const. ch I, art. 3 (emphasis added.) Defendants argue that Chittenden's tuition policy violates the Compelled Support Clause of Article 3. That is, the policy forces dissenting Chittenden and other Vermont taxpayers to "support [a] place of worship . . . contrary to the dictates of conscience." *Id.* Our decision must, therefore, turn on the meaning of the quoted language.

In construing our constitution, we have available a number of approaches in addition to our own precedents: examination of the text, historical analysis, sibling state constructions of similar provisions, and analysis of economic and sociological materials. See *State v. Jewett*, 146 Vt. 221, 225-27, 500 A.2d 233, 236-37 (1985). Like the First Amendment to the United States Constitution, Article 3 expresses two related, but different, concepts about the nature of religious liberty: No power may interfere with or control an individual's free exercise of religious worship, and no person can be compelled to attend or support religious worship against that person's conscience. We developed the meaning of the first concept in *State v. DeLaBruere*, 154 Vt. 237, 262-70, 577 A.2d 254, 268-72 (1990). Our cases have not significantly developed the meaning of the Compelled Support Clause.

A. Prior Case Law

Although they do not resolve this case, we nevertheless find it helpful to examine the relevant precedents of this Court. See *DeLaBruere*, 154 Vt. at 263, 577 A.2d at 268. Our first opportunity to interpret the Compelled Support

Clause came in *Swart*, a dispute with facts virtually identical to those before us in this case. In *Swart*, a citizen of South Burlington, which did not then have a high school, sued to prevent the local school district from paying tuition to two nearby Roman Catholic secondary schools that were attended by South Burlington students. The trial court decided to analyze the case under the First Amendment because this Court had not previously construed Article 3. This Court agreed, noting that "the militant sense of freedom which directed [our] . . . founders to be the first to write a prohibition against slavery . . . , was somewhat reserved in expression of religious liberty." 122 Vt. at 182, 167 A.2d at 517. It added that "[i]n the domain of religious liberty, the resolute history of the First Amendment seems the more demanding." *Id.* at 184, 167 A.2d at 518.

A related question is addressed in *Vermont Educational Buildings Financing Agency v. Mann*, 127 Vt. 262, 247 A.2d 68 (1968), where the chairman of the financing agency refused to issue revenue bonds and execute leases to construct a classroom building and science center for a Roman Catholic college in Rutland. In upholding the financing arrangement against challenges under both Article 3 and the First Amendment, the Court noted that Article 3 contains "no explicit injunction precluding assistance to sectarian education" and concluded that "[i]n this area, the limits of the First Amendment of the Federal Constitution are more restrictive," citing *Swart*. *Id.* at 269, 247 A.2d at 73. There was no violation of either constitution because " '[t]he mere fact that public funds are expended to an institution operated by a religious enterprise does not establish the fact that the proceeds are

used to support the religion professed by the recipient.' " *Id.* at 270-71, 247 A.2d at 518 (quoting *Swart*, 122 Vt. at 184-85, 167 A.2d at 518).[7] The Court determined that the cause of religion would neither be served nor obstructed by the facilities to be constructed and financed, and that the lease and financing were constitutional. *Id.* at 271, 247 A.2d at 716.

In *Mikell v. Town of Williston*, 129 Vt. 586, 589, 285 A.2d 713, 715-16 (1971), the Court concluded that the proceeds from lease lands, originally granted for church usage by the Royal Governor of New Hampshire and the State of Vermont, cannot be constitutionally paid by a town to the Episcopal Church. Although the plaintiff challenged the usage of the money under both the Vermont and the federal constitution, this Court relied solely on the federal constitution in holding that "[p]ublic subsidy of the dissemination of religious doctrine is unconstitutional." *Id.* at 589, 285 A.2d at 716.

Most recently, we confronted the question of public subsidies for sectarian education in *Campbell*. The *Campbell* decision is central to the parties' analysis of the current state of the federal law, but it does not discuss or apply the requirements of Article 3. Although the case was about local payment of tuition to attend a religious school, the issues were in a markedly different posture from those before us. In *Campbell*, the father of a secondary school student sought reimbursement for tuition he

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[7] We understand that the plain meaning approach taken by the concurrence would overrule the result of *Mann*. The decision held that the subsidy in that case did not violate Article 3; its holding on Article 3 was not dicta.

had already paid to an out-of-state Episcopal preparatory school. Pointing out the narrowness of our decision, we held that the Town of Manchester, which does not have a public high school and pays tuition to educate secondary school children, must reimburse plaintiff for the tuition. 161 Vt. at 442, 456, 641 A.2d at 354, 361. In reaching this decision, we emphasized the numerous circumstances that made the case unique: (1) the plaintiff had already paid the tuition so the town's payment would go to the parent and not to the sectarian school;[8] (2) the plaintiff did not live near a sectarian school, and there was no evidence that allowing tuition reimbursement would send any substantial number of children to sectarian institutions; (3) the sectarian school involved was out of state, and the regulation of the institution would not be affected by the ruling; and (4) because the out-of-state school could not meet Vermont public school approval standards, the reimbursement was limited to the average announced tuition of Vermont union high schools.[9] See *id.* at 452-53, 641 A.2d at 359-60. Under these circumstances, we held that reimbursement of the tuition would not offend the First Amendment. *Id.* at 456, 641 A.2d at 361.

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[8] We stated that "direct payments to a sectarian institution may raise additional considerations" and did not address the validity of direct payment. *Campbell*, 161 Vt. at 452, 641 A.2d at 359.

[9] Because the plaintiff could receive only partial reimbursement for the tuition he paid, we noted that the "case shows a preference for public education." *Campbell*, 161 Vt. at 454, 641 A.2d at 360. We said that "we leave for another day consideration of a case in which the reimbursement scheme might favor sectarian education." *Id.* at 455, 641 A.2d at 360.

Plaintiffs invoke this body of case law in support of their cause. They rely upon (1) *Campbell* and its analysis of federal law for the proposition that tuition payments to sectarian schools are constitutional as long as the schools are selected by the parents of the attending children, and (2) *Swart* and *Mann* for the proposition that Article 3 imposes no more constitutional restrictions than the First Amendment. On this basis, they argue that tuition payments to sectarian schools do not offend Article 3 as long as the parents choose the schools.

We are unable to draw the conclusion that a payment scheme that does not offend the First Amendment is necessarily consistent with Article 3. Whatever their interrelationship, the constitutional provisions are very differently worded. The First Amendment prohibits any "law respecting an establishment of religion." U.S. Const. amend. I. Article 3 prohibits coerced support for "any place of worship." Vt. Const. ch. I, art. 3. We are not dealing with "slightly variant phraseology" that can be easily reconciled. See *State v. Brean*, 136 Vt. 147, 151, 385 A.2d 1085, 1088 (1978) (discussing relationship between self-incrimination clause of Fifth Amendment to United States Constitution and Chapter I, Article 10 of the Vermont Constitution). As applied to the myriad of circumstances that might come before us, we do not believe we can simplistically state that one provision is always more restrictive of state action with respect to religion than another.

We also emphasize that the statements in *Swart* and *Mann* involved the Court's assessment of the state of federal law at the time. We believe that the *Swart* Court accurately analyzed and applied federal law as it then

existed in the leading United States Supreme Court decisions of *Everson v. Board of Education*, 330 U.S. 1 (1946), and *McCollum v. Board of Education*, 333 U.S. 203 (1948). However we might predict the United States Supreme Court would rule today, we believe it would have affirmed *Swart* at the time for the reasons this Court found controlling. This controversy arises at this time because Chittenden believes that the United States Supreme Court would rule differently today. Broad and general statements comparing the meaning of our constitutional provisions to the meaning of federal constitutional provisions are not particularly helpful when the meaning of the federal constitutional provision changes through new court decisions. See *State v. Ely*, 167 Vt. 323, 330-31, 708 A.2d 1332, 1336-37 (1997).

We do not know how the *Swart* Court would have ruled if required to analyze the tuition-payment scheme under Article 3. We must now perform that analysis.

B. Text of the Constitutional Provision

In performing this analysis, we turn first to the text of Article 3. The relevant language provides that "no person ought to, or of right can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience." Vt. Const. ch. I, art. 3. The meaning of some parts of the language is not disputed. No party disputes that the language creates a self-executing prohibition, see *Shields v. Gerhart*, 163 Vt. 219, 224, 658 A.2d 924, 928 (1995) (constitutional provision is self-executing "if it supplies a sufficient rule by means of which the right given may be enjoyed and protected") (quoting

Davis v. Burke, 179 U.S. 399, 403 (1900)) (quoting Cooley, Constitutional Limitations 99 (1883)), although they disagree about the nature of that prohibition. No party disputes that "support" includes financial support through the payment of taxes.[10] Finally, no party disputes that the phrase "contrary to the dictates of conscience" refers to the conscience of the person who provides support and that this element is met if compelled support for a place of worship offends the religious beliefs of the supporter.

The disagreements come in two places. First, plaintiffs argue that a school, however sectarian, is not a place of worship as that term is used in Article 3. Second, they assert that the intent behind the language was to prohibit

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[10] Numerous courts have held that payment of taxes is the equivalent of "support." For example, the Illinois Supreme Court paraphrased the provision as prohibiting the obligation to "contribute" to religious worship. *Reichwald v. Catholic Bishop of Chicago*, 101 N.E. 266, 267 (Ill. 1914). Relying on compelled-support language, the Virginia Supreme Court struck down a scheme that financed the education of certain students in sectarian schools because it "compels taxpayers to contribute money for the propagation of religious opinions which they may not believe." *Almond v. Day*, 89 S.E.2d 851, 858 (Va. 1955).

This point distinguishes this case from the recent decision of the Arizona Supreme Court in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), upholding a tuition tax credit law for contributions up to $500 to private schools, including religious schools. The applicable provisions of the Arizona Constitution prohibited the use of public money or property for religious instruction and the use of a tax in aid of a sectarian school. A majority of the Arizona Supreme Court held that the tuition tax credit system involved neither public money nor a tax and, therefore, did not offend the constitutional provisions. See *id.* at 620-21. Unlike *Kotterman*, this case involves a direct subsidy and not a tax credit.

state-sponsored religious institutions – that is, a state establishment of religion – and there is no state sponsorship here because the parents, not the school district, chose the religious school.

At the outset, we can narrow the first disagreement about the meaning of Article 3. We do not read defendants as claiming that any payment of public money to a religious school, for whatever reason, necessarily offends Article 3 because it supports a place of worship. In any event, we believe that such a broad reading of Article 3 was necessarily rejected in *Swart* and *Mann*. We noted in *Swart*, 122 Vt. at 184-85, 167 A.2d at 518, and reiterated in *Mann*, 127 Vt. at 270-71, 247 A.2d at 74, that the "mere fact that public funds are expended to an institution operated by a religious enterprise does not establish the fact that the proceeds are used to support the religion professed by the recipient." At least in *Mann*, this statement was applicable to Article 3. Thus, although the words might appear to be broader, we believe that Article 3 is not offended by mere compelled support for a place of worship unless the compelled support is for the "worship" itself.

As narrowed, plaintiffs' claim is that religious education is not religious worship within the meaning of Article 3. To reinforce this point, they note that the Vermont Constitution contains no specific provision on support of sectarian education, a subject we address in a later section of this opinion.[11] Plaintiffs also draw our attention to

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[11] On this point, plaintiffs and the concurrence find diametrically opposed plain meaning in the constitutional

Chapter II, § 68, the section on public education, which provides:

> All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct.

Vt. Const. ch. II, § 68. Plaintiffs see in this language an intent to aid religious education, which can occur through financial support. Defendants necessarily take the opposite side of the issue. We do not try to resolve this disagreement on the language alone and consider it in later sections of the opinion.

The second disagreement over the meaning of the text is central to the relationship between Article 3 and the First Amendment. The First Amendment prohibits any law "respecting an establishment of religion." U.S. Const. amend. I. Plaintiffs argue that Article 3 expresses the same policy aimed at the same governmental wrong. Thus, they assert that as long as government does not take sides among religions, it may compel support for religious activities. Here, government is not endorsing

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language. We agree with *Mann* that Article 3 contains "no explicit injunction precluding assistance to sectarian education," 127 Vt. at 269, 247 A.2d at 73, but cannot conclude, as plaintiffs argue, that the absence of an explicit mention of sectarian education in those terms means that Article 3 has no applicability.

any religion because the parents have free choice of religious or secular institutions.

Again, defendants disagree with this interpretation, and we do not attempt to resolve it on the language alone. We emphasize, however, that the text appears to be inconsistent with plaintiffs' position. Rather than prohibiting compelled support of a particular or state-selected place of worship, it prohibits compelled support of "*any* place of worship."[12] Vt. Const. ch. I, art. 3.

Although it is tempting to attempt to resolve the meaning of the constitutional provision on the words alone, we believe that approach is not possible in this case. We are particularly guided by our decision in *Peck v. Douglas*, 148 Vt. 128, 132, 530 A.2d 551, 554 (1987):

> The remark of Chief Justice John Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819),

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[12] We note, and must respectfully disagree with, the Ohio Supreme Court's recently expressed dictum that the Compelled Support Clause of the Ohio Constitution, which also precludes "compelled . . . support" of "any place of worship," is the "approximate equivalent" of the Establishment Clause. *Simmons-Harris*, slip op. at 19 (quoting Ohio Const. art. I, § 7). The Ohio Court struck down the state's school voucher program on unrelated state constitutional grounds, *id.* at 32, while explicitly recognizing that the religion clauses of the Ohio Constitution are "quite different from the federal language," *id.* at 20. Thus, although the Ohio Supreme Court refused to distinguish a Compelled Support Clause from the Establishment Clause, the court was careful to "reserve the right to adopt a different constitutional standard" under the state constitution in a future case. *Id.* We are required to confront the problem squarely in the instant proceeding.

> that "[w]e must never forget that it is a constitution we are expounding" resounds as a vital truth, and we keep it in mind as we face the task before the Court in this case. The standards for interpreting constitutional language and meaning, though related, are not the same as for ordinary statutes. Canons of construction, if applied, must be used more cautiously and sometimes differently.

When embarking on the process of statutory construction, we have established a clearly articulated hierarchy of available sources and turn first to the "plain, ordinary meaning of the language." *Brennan v. Town of Colchester*, 10 Vt. L.W. 83, 83 (1999) (citation omitted). If we can derive the intent of the Legislature from the plain meaning of the words, our task is normally at an end. See *Harris v. Sherman*, 167 Vt. 613, 614, 708 A.2d 1348, 1349 (1998) (mem.). By contrast, our decisions interpreting the Vermont Constitution have carefully avoided such a hierarchy. See *Benning v. State*, 161 Vt. 472, 476, 641 A.2d 757, 759 (1994) (noting that words of constitutional text are one of the tools available to find meaning of a constitutional provision). Other courts of last resort have followed this approach. See, e.g., *Thompson v. Craney*, 546 N.W.2d 123, 127 (Wis. 1996) ("plain meaning" of words is one of three sources used in construing the Wisconsin Constitution); *Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 785 (Mich. 1994).

There are sound reasons for avoiding excessive reliance on a plain meaning approach to constitutional interpretation, even if a plain meaning can be found. The compelled support language of Article 3 was first adopted in 1777 and has antecedents going back to the

Seventeenth Century. See *infra*, pp. 20-28. In trying to discern what such language means, we are "trying to make the best sense we can of an historical event – someone, or a social group with particular responsibilities, speaking or writing in a particular way on a particular occasion." R. Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve*, 65 Fordham L. Rev. 1249, 1252 (1997). As Professor Dworkin suggests, using as an example Milton's reference to "gay hordes" in *Paradise Lost*, the older the text, the more significant historical context becomes. See *id.* at 1251-53.

We pointed out in *Benning* that the constitutions of the New England states are "basically philosophic documents designed first and foremost to set a direction for civil society and to express and institutionalize a theory of republican government." *Benning*, 161 Vt. at 476, 641 A.2d 759. Similarly, we stressed in *Peck* that statutory construction techniques are often inapplicable because "a constitutional provision, unlike a statute, usually operates to limit or direct legislative action" and the constitution delineates only a "framework of government . . . [with] working details . . . left . . . for legislative definition." *Peck*, 148 Vt. at 132, 530 A.2d at 554. Finally, we note that the primacy of plain meaning in statutory construction is based upon the fact that the Legislature can change the wording to reflect its true intent with relative ease, a correction that is much more difficult for a constitutional provision. See J. Rubenfeld, *Reading the Constitution as Spoken*, 104 Yale L.J. 1119, 1130 (1995).

Even if we were prepared to say that the phrase "support any place of worship" has a plain meaning for the case before us, if it were included in a modern statute,

we cannot say that it has such a meaning as placed in Article 3. We must proceed to other evidence of the meaning of the Article.

C. Historical Context

One of our most useful tools to determine the meaning of a constitutional provision is an understanding of its historical context, and we have often relied upon history to illuminate the meaning of our constitution. See *Brigham v. State*, 166 Vt. 246, 257, 692 A.2d 384, 391 (1997); *State v. Wood*, 148 Vt. 479, 482, 536 A.2d 902, 904 (1987) (Chapter I, Article II must be construed consistent with its "historic purpose") As the *Swart* Court found in examining the historical record, it does not uniformly point in one direction. Like many of the colonies, our early history shows that we were organized by religious people for whom religion was central to their social and political life. We accepted the Church of England as an established state religion. The original prohibitions on religious discrimination in the 1777 Constitution applied only to men who professed "the protestant religion." Vermont Constitution of 1777, reprinted in *Records of the Council of Censors of the State of Vermont* 6 (P. Gillies & D. Sanford eds., 1991). The oath of office required that members of the House of Representatives be Protestants. See *id.* at 10. At the time of the adoption of the current constitution, the Legislature gave towns the power to tax to support churches. See *Swart*, 122 Vt. at 182-83, 167 A.2d at 517.

There are, however, three elements of the history that support defendants' position that the constitution prohibits the state financing of religious education involved

in this case. The first is our own experience with public support of churches and ministers. By a 1783 "Act to Enable Towns and Parishes to Erect Proper Houses for Public Worship and Support Ministers of the Gospel" (the Ministerial Act), two-thirds of the voters of a town could levy a tax on property in the town to construct a meeting house and hire and support a minister. 13 *Laws of Vermont* 195 (J. Williams ed.). Citizens could avoid taxation only by presenting a certificate signed by a minister, deacon or elder of their church to the effect that they had "different Sentiments in religious Duties" than those of the supported minister and church. *Id.* at 196. That act was adopted even though the 1777 Constitution contained the nonsupport language of Article 3 and remained in effect through the adoption of the 1786 and 1793 Constitutions.

Our state constitution antedates the concept, first enunciated by the United States Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803), that in the form of government established by the federal constitution, the judiciary would be the ultimate arbiter of constitutional meaning.[13] Thus, it is not illogical that the framers of the Vermont Constitution provided for what was at least an alternate avenue for reconciling statutory enactments with the fundamental blueprint of state government. This they did. Until 1870, the Vermont Constitution provided for a Council of Censors, an elected body of thirteen that came together every seven

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[13] This Court had, however, accepted such a premise before *Marbury*, see, e.g., *Doe v. Smith & Barnum*, 1 Tyler 38, 41 (1801), although it first struck down a legislative act as unconstitutional in *Dupy v. Wickwire*, 1 Chipman 237, 238 (1814).

years to determine whether "the legislative and executive branches of government . . . have . . . assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution." Constitution of 1777, § XLIV. Although the Council of Censors was "an advisory body whose authority came from its position and persuasiveness," *Records of the Council of Censors*, Introduction, at xi, its actions commanded serious respect and often resulted in changes in laws, especially in its early years.

In 1799, the Council of Censors reported that the 1797 version of the Ministerial Act to support the gospel violated Article 3 and should be repealed. After quoting the nonsupport language, the Council reasoned:

> Here . . . conscience is made the only criterion by which a man can possibly be bound, in the execution of such designs; in opposition to which, the law we hereby propose to have repealed, expressly binds the citizens of this state, indiscriminately, to erect and support places of public worship, and to maintain ministers, contrary to this clearly defined right, provided they are so unfortunate to be in the minority of any town, who may act under the authority of this law, and who are not at the time of taking the vote, possessed of a certain prescribed certificate.
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> Could not the legislature as well declare, that the inhabitants of every town in this state, should build a house of public worship, and settle and support a congregational minister, provided a certain number thereof were not possessed of a certificate, that they supported a minister of a different denomination? This

> would only support the same ground that the law contemplates, as in both cases the minority are only subjected by the majority. But in no case have civil power any constitutional right to interfere in religious concerns, except to bind persons or communities to discharge their civil contracts, individually entered into, for the mutual support of religious social worship.

Id. at 158 (quoting An Address of the Council of Censors to the People of Vermont (1800)); see also II S. Williams, Natural and Civil History of Vermont 383 (2d ed. 1809).

The 1800 report proved to be only the first step toward resolving the controversy. In 1801, the Legislature amended the act for the support of the gospel to eliminate what it believed to be the offending provisions. See An Act in Addition to, and Alteration of an Act, entitled "An Act for the Support of the Gospel," Laws of 1801, at 17. The 1801 statute maintained the right of two-thirds of the voters to create a system of tax financing of churches and ministers, but liberalized the tax exemption. Under the 1801 statute, the exemption was automatic when the taxpayer delivered to the clerk of the town or parish a signed writing stating: "I do not agree in religious opinion with a majority of the inhabitants of this town (or parish as the case may be)." *Id.* § 2.

Although the 1801 statute eliminated the requirement of a certificate from an alternative religious body, and thus allowed an exemption for those who subscribed to no religion, it did not satisfy the Council of Censors. In its next report in 1806, the Council concluded that the 1801 Act also violated Article 3 and should be repealed. See

Records of the Council of Censors at 180. The report reiterated that support for religion was a matter of personal conscience for which "[m]an . . . feels himself accountable to none but his God." *Id.* at 181 (quoting Address of the Council of Censors). The Council acknowledged that it was influenced by the "consequences" of the law, which, it believed, fed a "constant belief" that the government had curtailed the privileges of some citizens and lessened their rights, exciting animosities and engendering ill will. *Id.* at 181-82. The Council found the Act represented "the dangerous length of which it is a foundation for us to go, in both civil and religious usurpation." *Id.* at 182. On receiving the Council's report, the Legislature repealed the Ministerial Act and ended tax support for ministers in Vermont. See Laws of 1807, ch. xx.

On its face, the Council record is valuable as an early interpretation of Article 3. It is also significant as an answer to the view, apparently espoused by this Court in *Swart*, that the existence of the Act for the support of the gospel showed that tax support for houses of public worship, and ministers of the gospel was, under proper circumstances, thought to be consistent with Article 3. See *Swart*, 122 Vt. at 183, 167 A.2d at 517. Instead, the historical record shows that the institution charged with determining constitutional conformity, the Council of Censors, from its beginning saw the Act as a violation of Article 3 and pursued this determination until the conflict was eliminated.[14]

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[14] The history of the Ministerial Act is instructive on how the early constitutional provisions were viewed in their time. In modern times, we have stressed the "preeminence of the

Most important, the experience with the Ministerial Act is inconsistent with plaintiffs' position that Article 3 is intended only to prohibit a state establishment of religion. Even the first Ministerial Act was based on the choice of the taxpayer and did not take sides among religions. The telling event, however, was the Council of Censors' rejection of the amended Ministerial Act which allowed an exemption for taxpayers who were unwilling to support any religion. The issue then was not a state establishment of religion, but any public financial support of religious activity, even when raised solely from religious adherents.

The second relevant element of the historical record is the history of the "Virginia Bill for Religious Liberty," as enacted in 1785 based on the draft of Thomas Jefferson.

Vermont Constitution in our governmental scheme" and that it "stands above legislative or judge-made law." *Shields v. Gerhart*, 163 Vt. 219, 223, 658 A.2d 924, 927 (1995). That view did not prevail uniformly in the eighteenth century, at least among those who led the state at the time. See G. Aichele, *Making the Vermont Constitution*: 1777-1824, 56 Vermont History 166, 186 (1988). The Council of Censors became a vehicle for the lawyers, who assumed leadership positions at the end of the eighteenth century and beginning of the nineteenth, to insist on the supremacy of the constitution over the more pragmatic approach to governance that had frequently prevailed. See F. Smallwood, *Thomas Chittenden: Vermont's First Statesman* 125-28, 133-34 (1997). Thus, we view the Ministerial Act history as less a debate and conflict among persons who had differing views about the meaning of the constitutional language and more a conflict about whether Vermont's government would adhere to the constitutional command.

See *Swart*, 122 Vt. at 183-84, 167 A.2d at 518.[15] Because of its author and the primary advocacy for it by James Madison, the Virginia law became an important building block for the First Amendment to the United States Constitution and the interpretation of that amendment by the United States Supreme Court. See *Everson*, 330 U.S. at 11-16. We also find this law, and its history, relevant to our interpretation of Article 3.

Although the Virginia law has a detailed preamble that is important to its interpretation, the enactment is quite short, and its nonsupport provision is very similar to Article 3. It provides:

> *We the General Assembly of Virginia* do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or bur[d]ened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or effect their civil capacities.

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[15] *Swart* discussed the Virginia Act as relevant to its analysis of the United States and Vermont Constitutions and drew no specific conclusion about it. Its influence on the First Amendment was direct because James Madison was a drafter of the First Amendment. We have no direct evidence of its influence on the adoption of the provision of the Vermont Constitution, although it could well have had an influence. Our interest here is in the contemporaneous understanding of the wording chosen to express Jefferson's views.

T. Buckley, Church and State in Revolutionary Virginia, *1776-1787* (1977) at 191 (reproducing text); *Everson*, 330 U.S. at 13 (reproducing part of same text). The language of the Virginia law relevant to the controversy before us states that a man shall not be "compelled to . . . support any religious worship, place or ministry whatsoever." The preamble describes the policy of the language: "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors*, is sinful and tyrannical." *Buckley, supra* at 191; *Everson*, 330 U.S. at 13 (reproducing same text in slightly different form).

The Virginia law was passed in response to a bill "Establishing a Provision for Teachers of the Christian Religion," which almost passed in the years before the Jefferson law was enacted. See *id.* at 72-74 (Rutledge, J., dissenting, Supplemental Appendix).[16] It provided for taxpayer support of "learned teachers" of "Christian knowledge" in order "to correct the morals of men, restrain their vices, and preserve the peace of society." *Id.* at 72. Each owner of property on which the tax was levied would specify the "society of Christians" to which the owner's tax money would be paid. *Id.* at 72-73. If the taxpayer failed to specify the beneficiary, that money would be placed in the public treasury to be expended for

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[16] We have provided citations to the relevant documents in the text and appendices of *Everson* as the source most likely to be available to the readers of this opinion. The sequence of events, as well as the relevant documents, are described in detail in *Buckley, supra*.

the encouragement of seminaries of learning in the county. *Id.* at 74.

In his "Memorial and Remonstrance" on the bill, James Madison described its provisions as "a dangerous abuse of power." *Id.* at 64. Madison's main disagreement with the bill was because man's duty is "to render to the Creator such homage and such only as he believes to be acceptable to him." *Id.* He argued that it discriminated against those who professed a non-Christian religion or no religion:

> Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered.

Id. at 66.

Jefferson was later to describe the Virginia law as creating "a wall of separation between church and State." *Reynolds v. United States*, 98 U.S. 145, 164 (1878). What is instructive here is that the language used to create the wall is essentially the same as that in Article 3 of our constitution. See G. Tarr, *Church and State in the States*, 64 Wash. L. Rev. 73, 81 (1989) (familiar story of struggle of Jefferson and Madison to establish religious freedom in Virginia "can offer new insights if viewed from the perspective of state constitutionalism"). Moreover, the Virginia law was enacted in response to a plan that bears some similarities to that before us. It applied specifically

to religious teachers, and although it required tax financing of education, it gave choice in the method of its implementation. Christians could choose their beneficiary, and any taxpayer could choose to designate the money to the seminary education system of the time, rather than to a religious order. Despite the choice feature, the Virginia law responded that compelling "a man to furnish contributions of money for the propagation of opinion which he disbelieves and abhors, is sinful and tyrannical."

We believe that the Virginia experience undercuts plaintiffs' position that the intent of Article 3 was to cover religious worship, but not religious education. The Virginia controversy was about religious education, and Madison saw no line between it and religious worship. Language virtually identical to Article 3 was adopted to prohibit compelled support of religious education.

The third relevant element of the historical record is the source of the constitutional language. Much of our original constitutional language came from that of Pennsylvania. See J. Shaeffer, *A Comparison of the First Constitutions of Vermont and Pennsylvania* in *In a State of Nature: Readings in Vermont History* 54, 54 (H. Muller & S. Hand eds., 1982). Thus, Article I, § 3 of the Pennsylvania Constitution of 1776 provided that "no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent." See W. Ball, *The Religion Clauses of the Pennsylvania Constitution*, 3 Widener J. Pub. L. 709, 714 n.25 (1994). Pennsylvania evolved under the dominating influence of the Quakers and did not establish an official church. See

T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 72 (1986); L. Levy, *The Establishment Clause: Religion and the First Amendment* 25 (1986). Indeed, "from its beginnings, . . . [Pennsylvania] established the broadest religious liberty in colonial America . . . , and [t]he colony incorporated into its laws . . . a refusal to provide public tax support for churches and clergy." Curry, *supra* at 75. The constitutional nonsupport language goes back to the 1682 Frame of Government of the commonwealth. See *id.*

Swart cited the differences between the Pennsylvania Constitution and the Vermont Constitution, quoting from the mid-nineteenth century biography of Thomas Chittenden by Daniel Chipman for the proposition that Vermont adopted a diluted version of the Pennsylvania religion clause because the Pennsylvania view of "religious liberty would be somewhat larger than the people of New England had been accustomed [to]." *Swart*, 122 Vt. at 182, 167 A.2d at 517 (quoting D. Chipman, *Memoir of Thomas Chittenden* 84 (1849)). We have noted, however, that the Chipman observation was about the final sentence in Article 3 and not the nonsupport clause. See *DeLaBruere*, 154 Vt. at 265, 577 A.2d at 269. Indeed, Chipman found no significant difference between the nonsupport clause in the Vermont Constitution and that in the Pennsylvania Constitution. See Chipman, *supra* at 28-29.[17]

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[17] Later historians have noted that Chipman undercounted the number of changes and left out some significant changes. See *Schaeffer*, *supra* at 50 (asserting there are twenty-seven substantive changes). Although the wording of the Vermont religion provision is slightly different from that of the Pennsylvania provision, none of the historians have found that difference significant.

We believe that the 1777 and later constitutions necessarily imported Pennsylvania's Quaker view of non-support into our constitutional law.

We recognize that one part of the Pennsylvania history raises questions about the applicability of Article 3 to religious education, supporting plaintiffs' position. As one commentator noted: "Article I, section 3 [of the Pennsylvania Constitution] was adopted in 1776, long before Pennsylvania's public school system was in place. The framers of the article, therefore, could not have pondered its application to sectarian school grants once a public school system evolved." J. Jones, *Pennsylvania's Choice: "School Choice" and the Pennsylvania Constitution*, 66 Temple L. Rev. 1289, 1311 (1993).[18] On this point, we believe our history is different.

Following most of the language of the Pennsylvania Constitution, the 1777 Vermont Constitution provided that "[a] school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town, making proper use of school lands in each town, thereby to enable them to instruct youth at low prices." Constitution of 1777, Chapter II, Section XL. By 1782, the Vermont Legislature had implemented the section by

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[18] Despite the historical point, the author concludes that tuition payment to sectarian schools under a choice plan should be found to violate Article I, Section 3 of the Pennsylvania Constitution, arguing that the need to subsidize nonpublic schools "has long since passed and there is no longer a need to ignore the limits of article I, section 3." See Jones, *supra* at 1311-12.

"providing for and requiring that a uniform system of local school districts be created and that they be financed by taxes on all rateable property of residents of the district, supplemented by a special tax paid by parents whose children attended schools." Fussell, *The Emergence of Public Education as a Function of the State in Vermont*, 29 Vermont History 13, 37 (1961); see also M. Stone, *History of Education: State of Vermont* 51-55 (1935). The system was "sufficiently comprehensive in scope and purpose." Stone, *supra* at 53.[19]

Public education in Vermont may have been only an ideal when our first constitution was adopted, but it quickly became a reality when state and local government could deal with matters other than the security of the inhabitants. We see no reason why, from its first adoption, Article 3 would not be seen to cover all forms of religious worship even as part of religious education. As indicated above, the Virginia religious-support controversy arose over what was being labeled as religious education. We believe that no artificial line between religious worship and religious education emerged in Vermont.

One other aspect of our history deserves some consideration, primarily for what it does *not* tell us, and is a bridge to our consideration of decisions from other states. Broadly speaking, all of the state constitutions in the

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[19] In comparison, Pennsylvania passed an act to establish a general system of education in public schools in 1834, almost fifty years after it adopted its constitutional language. See A. Stokes & L. Pfeffer, *Church and State in the United States*, 271 (1st ed. 1964).

United States contain some combination of the following provisions: (1) an Establishment Clause that is substantially similar to the language of the First Amendment; (2) a Compelled Support Clause identical or similar to that in the Vermont Constitution; (3) a prohibition against the state exercising any preference toward any religious group or discriminating among them; (4) a direct prohibition on the state making contributions of public funds to religious institutions and/or sectarian schools; and (5) a clause proscribing state support for any private school regardless of whether it is sectarian or not. See Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State through State Constitutional Provisions*, 71 Va. L. Rev. 625, 631-43 & nn. 31-47 (1985) (citing and cataloging constitutional provisions at issue). The constitution of every state except Maryland and Vermont contains some form of the latter two clauses. See *Horace Mann League v. Board of Pub. Works*, 220 A.2d 51, 76 (Md. 1966).

The significance of Vermont's decision not to adopt a more explicit constitutional provision addressing sectarian schools is in dispute. Plaintiffs contend that this historical omission shows that the constitutional drafters were not concerned with public funding of religious schools. At least in part, the Maryland courts have accepted this argument. After noting that the Maryland Legislature imposed taxes to support churches well after the constitutional nonsupport language was adopted, the Maryland Court of Appeals commented, "Had the people of Maryland desired to change its practice relative to such grants, it certainly would be likely that they would have made similar provisions after so many states had done

so." *Id.* Thus, the court found that the absence of a special constitutional provision demonstrated that Maryland citizens were not concerned about subsidies for religious schools.

We cannot place the significance on the absence of a more specific constitutional provision urged by plaintiffs and accepted by the Maryland Court. As discussed above, our experience with public support of religious institutions is different from that in Maryland. We did not have the same reason to adopt such a provision as existed in Maryland. Moreover, the specific prohibitions on public financial support for religious schools and other religious institutions were not in the original constitutions of the early American states. They were adopted between 1830 and 1928 in response to attempts to obtain funds for Roman Catholic institutions, particularly schools. See Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917, 919-20 (1941) (citizens saw that "the intersectarian compromise [of secular public schools] was safe only if embodied in explicit constitutional provision"); R. Utter & E. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 Hastings Const. L.Q. 451, 464-67 (1988); Stokes & Pfeffer, *supra* at 271 (from 1844 on, every state amending its constitution, and most new states on admission to the union, adopted a constitutional provision prohibiting "any diversion of public funds to denominational purposes"). These later amendments shed no light on Article 3, which was first adopted in 1777.

More importantly, the Vermont Constitution is the least susceptible to being defined by its omissions. It is the shortest and least amended constitution in the United

States. See J. Kinkaid, *State Constitutions in the Federal System*, 496 Annals of the American Academy of Political and Social Science 12, 18 (1988) (noting that Vermont's is the only state constitution shorter than the U.S. Constitution). Chapter I, the Declaration of the Rights of the Inhabitants of the State of Vermont, has been amended only twice since 1793; neither amendment was to Article 3. See W. Hill, *The Vermont State Constitution: A Reference Guide* 20, 23 (1992). The school provision, Chapter II, § 68, has been amended twice, but the amendments occurred in 1954 and 1964, after the United States Supreme Court applied the religion provisions of the First Amendment to the states, see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and the decisions in *Everson* and *McCollum* made clear that direct payment of state funds for religious education offended the First Amendment. In view of this history, we can draw no significance from the absence of a special constitutional amendment on religious education.

D. Decisions of Other States

In that light, we next consider the decisions from other states on similar issues. We have often found that analysis of the decisions of sibling states is helpful in interpreting provisions of the Vermont Constitution. See *Ely*, 167 Vt. at 331, 708 A.2d at 1337; *Benning*, 161 Vt. at 478, 641 A.2d at 760; *DeLaBruere*, 154 Vt. at 266, 577 A.2d at 270. Of course, these decisions must be based on similar or identical constitutional language. See *Brigham*, 166 Vt. at 257, 692 A.2d at 391; *State v. Read*, 165 Vt. 141, 154, 680 A.2d 944, 952 (1996).

Because virtually all states have amended their constitutions to adopt specific provisions on state support of religious institutions, particularly sectarian schools, many of the decisions involving fact patterns similar to that before us are only marginally relevant to our task. The primary example of this is the recent Wisconsin Supreme Court decision in *Jackson*, which upheld against state and federal constitutional attack the Wisconsin "Parental Choice Program," a plan that provides for public school students to attend both sectarian and nonsectarian private schools at taxpayer expense. Specifically, the court held that the program did not violate the Compelled Support Clause of Article 1, § 18 of the Wisconsin Constitution, a provision similar to Article 3. See *Jackson*, 578 N.W.2d at 623.

We would view *Jackson* as a strong precedent for plaintiffs' position, but its reasoning is unpersuasive. Article 1, § 18 of the Wisconsin Constitution also contains language that prohibits drawing funds from the state treasury " 'for the benefit of religious societies, or religious or theological seminaries.' " *Id.* at 620 (quoting Wis. Const. Art. I § 18). Noting that it has "traditionally looked to federal establishment clause jurisprudence, and in particular the primary effects test," when interpreting this clause from the Wisconsin Constitution, the court reasoned that the primary effect of the School Choice Program was not the advancement of religion given the program's neutrality as between "sectarian and nonsectarian alternatives." *Id.* at 621 & n.21. Thus, the court upheld the program under the Benefit Clause.

The Wisconsin Supreme Court went on to rule that the School Choice Program also did not transgress the Compelled Support clause of Article I, § 18, reasoning:

> The Respondents assert that since public funds eventually flow to religious institutions under the [School Choice Program], taxpayers are compelled to support places of worship against their consent. This argument is identical to Respondents' argument under the benefits clause. We will not interpret the compelled support clause as prohibiting the same acts as those prohibited by the benefits clause. Rather we look for an interpretation of these two related provisions that avoids such redundancy.

Id. at 622-23 (citation omitted). The court decided that because of the presence of the Benefit Clause, the Compelled Support clause must relate only to those who use the tax money. Since students were not required either to attend sectarian schools or to participate in religious activities when they did,[20] the court held that the program did not violate the Compelled Support clause. *Id.* at 623.

Our constitution lacks a specific provision akin to Wisconsin's Benefit clause. Thus, we are not required to adopt a construction of our Compelled Support clause that is consistent with, and subservient to, this more specific provision. Not surprisingly, we can find no other

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[20] We do not believe that we can make the same finding about the tuition-payment plan in Vermont. Nothing prevents the school for which tuition is paid from requiring that students participate in religious exercises and MSJ appears to have such a requirement in some instances.

state decision that construes a Compelled Support clause in the way that the Wisconsin Supreme Court construed its constitutional provision. Indeed, plaintiffs have never argued that Article 3 can be construed in the fashion adopted by the Wisconsin Supreme Court.

Jackson demonstrates that we can rely only on decisions that are based on a Compelled Support clause, and where the court's construction of the clause is not determined by its construction of other more specific provisions. Our review of the decisions from other states shows a few such cases.

As already noted, the Ohio Supreme Court has very recently decided a case that includes dicta essentially equating the Ohio Constitution's Compelled Support Clause with the Establishment Clause of the First Amendment. See *Simmons-Harris*, slip op. at 19-20. For the reasons already discussed, both the wording of Vermont's Compelled Support Clause and the relevant historical record preclude us from adopting such a view. Accordingly, we draw no useful insights from the Ohio decision.

Another case is *Almond*, which takes up a "free exercise" clause, an explicit prohibition against the appropriation of public funds or property to sectarian institutions or entities controlled by such an institution, and a Compelled Support Clause that is similarly worded to Vermont's. See *Almond*, 89 S.E.2d at 857-58. At issue was a program providing for state tuition payments to orphans of Virginia citizens who had served in the military. See *id.* at 853. The funds were made available for children attending both sectarian and nonsectarian schools. See *id.* at 854. In determining that the program was inconsistent

with the Virginia constitution, the court found three independent bases for its decision: the use of public funds to provide direct support of religious institutions in contravention of antiestablishment principles, the provision of an "invaluable aid" to sectarian groups "through use of the state's compulsory public school machinery," and the fact that the tuition-payment program "compels taxpayers to contribute money for the propagation of religious opinions which they may not believe." *Id.* at 858.[21]

We have also considered *Knowlton v. Baumhover*, 166 N.W. 202 (Iowa 1918), decided under a constitutional provision that reads:

> The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

Iowa Const., Art. I § 3. In *Knowlton*, the school district had closed the public schoolhouse and rented space for

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[21] In a more recent case concerning a city bond issue designed in part to provide construction assistance to sectarian educational institutions, the Virginia Supreme Court has omitted the nonsupport clause from an enumeration of the "pertinent" language in Article I, chapter 16 of the Virginia Constitution. *Habel v. Industrial Dev. Auth. of Lynchburg*, 400 S.E.2d 516, 518 (Va. 1991). The court invalidated the bond issue based on the language prohibiting the state from conferring any "peculiar privileges or advantages on any sect or denomination." *Id.* at 518-19. It is not clear whether the court deliberately eschewed mention of the Compelled Support Clause or whether the parties simply did not invoke it.

public education in a Roman Catholic parochial school. Although the public school classroom was separate, the class was taught by a Catholic nun, "arrayed in the striking robes" of her order, and instruction included the study of the Catholic catechism and other Catholic religious study. Holding that § 3 forbids "all taxation for ecclesiastical support" and that it was not necessary "to show that the school is wholly devoted to religious or sectarian teaching," the court found that the school arrangement violated § 3 because it used "the public schools or the public funds for the advancement of religion or sectarian teaching." *Knowlton*, 166 N.W. at 207. The court did not frame its discussion around the issue of establishment, i.e., concerns over whether the program at issue was enfranchising Catholicism as an official state religion to the exclusion of all others, but rather that such a program requires individual taxpayers to support a religious denomination regardless of whether they would so choose. See also *Rudd v. Ray*, 248 N.W.2d 125, 132 (Iowa 1976) (noting that framers of Iowa Constitution sought to enjoin both "the evils incident to a state church, [and] forced taxation to support the same").[22] Although

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[22] In *Rudd*, the court sustained the practice of furnishing chaplains and facilities for their work at the state penitentiary. See *Rudd*, 248 N.W.2d at 133. The basis of the holding was historical analysis unique to Iowa: In 1855, two years before a constitutional convention adopted the identical Establishment and Compelled Support Clauses contained in the 1846 version of the state constitution, Iowa's legislature adopted legislation authorizing the challenged prison practice. See *id.* at 132. The court thus reasoned that it "seems likely the delegates to the 1857 Iowa Constitutional convention did not feel Art. I, § 3, of [Iowa's] present constitution would proscribe a statutory

the facts of *Knowlton* are somewhat different from those before us, we do not believe its constitutional analysis can be meaningfully distinguished by the situation we confront in the instant case. See also *Williams v. Board of Trustees Stanton Common Sch. Dist.*, 191 S.W. 507, 507 (Ky. 1917) (Compelled Support Clause of Kentucky constitution among provisions requiring that "no part of the common school fund shall ever be used in aid of or for the use or benefit of a sectarian or denominational school"); *Berghorn v. Reorganized Sch. Dist. No. 8*, 260 S.W.2d 573 (Mo. 1953);[23] *Findley v. City of Conneaut*, 62

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scheme then recently enacted." See *id.* Without discussion, the court dismissed *Knowlton* and other previous Iowa cases as not controlling. See *id.*

[23] In *Berghorn*, the Supreme Court of Missouri invalidated on state constitutional grounds a taxpayer-supported program of school instruction conducted on church property by Catholic nuns. *Berghorn*, 260 S.W.2d at 583. Although the opinion does not refer explicitly to the teaching of sectarian principles, it notes that children who objected to "certain practices" (presumably religious ones) in the schools in question were given the option of attending conventional public schools elsewhere. See *id.* at 583-84. The opinion does not refer to which specific language in the Missouri Constitution provides the basis for its holding, but it quoted with approval the trial court's conclusion that the state constitution establishes an "unqualified policy . . . that no public funds or properties, either directly or indirectly, be used to support or sustain any school . . . conducted in such a manner as to influence or predispose a school child toward the acceptance of any particular religion or religious beliefs." *Id.* at 582-83. Missouri's constitution includes both a Compelled Support and a Nonpreference Clause as well as language enjoining appropriations in support of sectarian institutions. See Mo. Const. art. I, §§ 6-7.

N.E.2d 318, 323 (Ohio 1945) (under Ohio Constitution's Compelled Support and Nonpreference Clauses, municipality without authority to comply with condition in benefactor's will to issue bonds to support sectarian school established by will); cf. *People v. Board of Educ.*, 68 N.E.2d 305, 308 (Ill. 1946) (Compelled Support Clause in Illinois constitution not a bar to public school program of released time for religious instruction).

It is important to put these decisions from other states in context. We are not dealing here with the myriad ways that a public school district can subsidize education in a religious school by paying for expenses that occur whether or not the school was sectarian.[24] For example, this case is not governed by those that involve payments for school transportation to sectarian schools, see, e.g., *Snyder v. Town of Newton*, 161 A.2d 770, 778-79 (Conn. 1960) (provision of transportation assistance to children of sectarian schools "primarily serves the public health, safety and welfare and fosters education" and "cannot be said to compel support of any church"), text books used in sectarian schools, see, e.g., *Opinion of the Justices*, 258 A.2d 343, 347 (N.H. 1969) (textbook loan program constitutional if books are secular), or teachers of secular subjects to sectarian school children, see *Scales v. Board of Educ.*, 245 N.Y.S.2d 449, 454 (N.Y. Sup. Ct. 1963) (home-

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[24] Although the concurrence has not fleshed out its plain meaning approach, we infer that it would find unconstitutional any subsidy for activities in or by a sectarian school, irrespective of the sectarian nature of those activities. We stress that we are not deciding whether any of the subsidies discussed in the text would violate Article 3.

teaching assistance of handicapped parochial school student constitutional because aid to parochial school is "slight and remote"). Nor is this a case where the amount of the subsidy is so small that it clearly covers only the cost of secular educational expenses. See *Dunn v. Chicago Indus. Sch. for Girls,* 117 N.E. 735, 737 (Ill. 1917) (payment to Roman Catholic industrial school on behalf of committed juvenile is constitutional since payment amount is below cost of food, clothing, medical care and training in useful arts and domestic science and only half of such costs in secular institution). Nor, as we emphasized above, is the issue that education occurs in a religious school, rather than the content of that education. In this case, the financing scheme can, and presumably will, directly pay for religious instruction. An early leading treatise on American state and federal constitutional law summarizes the law applicable to this case as follows: "Those things that are not lawful under any of the American constitutions may be stated thus: . . . (2) Compulsory support, by taxation or otherwise, of religious instruction." H T. Cooley, *Constitutional Limitations* 966-67 (8th ed. 1927).

In conclusion, we return to the Article 3 textual issues that divide the parties. In view of the history, as we have outlined above, and the decisions from other jurisdictions, we see no way to separate religious instruction from religious worship. The limited record we have before us indicates that there is no line between these concepts. Nor are we persuaded that the constitutional

drafters authorized public financing of religious education in Chapter II, § 68. The specification that such education be "encouraged and protected" does not extend to public financing in light of the prohibition of Article 3.

Nor do we believe that Article 3 is intended to cover only state religious establishments. This limitation is consistent with neither the text nor the history, particularly the action of the Council of Censors with respect to the Ministerial Act.

Thus, we conclude that the Chittenden School District tuition-payment system, with no restrictions on funding religious education, violates Chapter I, Article 3. In expressing this conclusion, we think it appropriate to state what we have not decided. The major deficiency in the tuition-payment system is that there are no restrictions that prevent the use of public money to fund religious education. See *Opinion of the Justices*, 616 A.2d 478, 480 (N.H. 1992) (deficiency in educational-choice plan under New Hampshire Constitution is that "[n]o safeguards exist to prevent the application of public funds to sectarian uses"). Schools to which the tuition is paid by the district can use some or most of it to fund the costs of religious education, and presumably will. We express no opinion on how the State of Vermont can or should address this deficiency should it attempt to craft a complying tuition-payment scheme. We decide only that the current statutory system, with no restrictions on the purpose or use of the tuition funds, violates Article 3.

We are also, by this opinion, not taking sides on the desirability of parental choice to determine the education available to their children. As plaintiffs have argued, and

as we have accepted at least in part in *Campbell*, the United States Supreme Court may well decide that the intervention of unfettered parental choice between the public funding source and the educational provider will eliminate any First Amendment objection to the flow of public money to sectarian education. We cannot conclude, however, that parental choice has the same effect with respect to Article 3. If choice is involved in the Article 3 equation, it is the choice of those who are being required to support the religious education, not the choice of the beneficiaries of the funding. Even the choice of the taxpayers, however, was not sufficient to save the Ministerial Act in the view of the Council of Censors.

IV. Plaintiff's Free Exercise Claim

Because we have concluded that Chittenden's tuition payments to religious schools violate Article 3, we must address plaintiff's additional contention that such an outcome violates the Free Exercise Clause of the First Amendment. It plainly does not. The Free Exercise argument is premised on plaintiff's assumption that we would conclude that children who attend religious schools may not receive public educational funding, while children who attend public schools may. This is not our ruling. We have determined only that public funds may not pay for religious worship within the meaning of Article 3, wherever it occurs.

Such a determination is in no sense at variance with bedrock jurisprudence relating to the Free Exercise Clause. The touchstone is "neutrality toward religion." *Board of Educ. of Kiryas Joel Village Sch. v. Grumet*, 512 U.S.

687, 696 (1994) (citation and internal quotation marks omitted). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires," and a state is therefore precluded from "impos[ing] special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (citations omitted); see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993). Therefore, a statute may violate the Free Exercise Clause only if its "purpose or effect . . . is to impede the observance of one or all religions" and regardless of whether any such effect is direct or indirect. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Obviously, and as noted in *Sherbert*, the Free Exercise Clause may be implicated where the denial of a government benefit is the instrumentality. See *id.* However, unlike the unemployment benefits at issue in *Sherbert*, denied to the plaintiff in that case because her religious beliefs prohibited her from working on Sundays, today's ruling requires no one "to choose between following the precepts of [his or her] religion and forfeiting benefits" that would otherwise be available from the government. *Id.*; see also *Strout*, 1999 U.S. App. Lexis 10932 at *20-22 (sustaining statutory ban on tuition reimbursement for sectarian schools); *Bagley*, 1999 WL 236464 at *5 (same).

V. Conclusion

By prohibiting compelled taxpayer support of religious worship, Chapter I, Article 3 of the Vermont Constitution renders unconstitutional the Chittenden Town School District tuition-payment policy to the extent that it

authorizes tuition reimbursement to sectarian schools without appropriate restrictions. This application of state constitutional law does not implicate the Free Exercise Clause of the First Amendment. Because we conclude that the superior court correctly entered summary judgment in favor of defendants, their cross appeal and plaintiffs' motion to dismiss it are both moot and need not be considered.

Affirmed.

FOR THE COURT:

/s/ John F. Dooly
Associate Justice

JOHNSON, J., concurring. While I agree with the result reached by the majority, I believe that the majority asks and answers the wrong question, causing it to delve into a lengthy and unnecessary analysis of the distinction (or lack thereof) between religious education and religious worship. It has eschewed a more straightforward analysis based on the plain meaning of Chapter One, Article 3 of the Vermont Constitution and the specific facts of this case, and has unnecessarily confused our holding as a result.

The issue before us is simple. Chittenden School District wishes to use tax revenues to fund tuition payments to Mount Saint Joseph's Academy (MSJ). The plain language of Article 3 prohibits the State from compelling

citizens to support a place of worship. Taxation is compelled support. MSJ, the parties agree, is a pervasively sectarian school at which religious worship regularly takes place in conjunction with educational activities. Therefore, the payments to MSJ violate Article 3.

Chittenden School District and plaintiffs-intervenors did not confront the plain language of Article 3 either in their appellate briefs or at oral argument.[1] To the extent plaintiffs made any argument based on the Vermont Constitution, it was that the Compelled Support Clause of Chapter One, Article 3 and the Education Clause of Chapter Three, Article 68 are coextensive with the federal provisions. As plaintiffs emphasize, and as we detailed in *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 448-51, 641 A.2d 352, 357-58 (1994), the historic concern under the Establishment Clause of the First Amendment has been with excessive entanglement between religious organizations and governmental actors. The focus in recent cases involving funding of religious schools has been the question of who receives or controls the expenditure of the public money – private individuals or the sectarian school. *See, e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986) (use of grant money to allow student to train as pastor does not violate Establishment Clause where money was provided

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[1] Chittenden spent two and one-half pages in its principal brief discussing the Vermont Constitution and plaintiffs-intervenors cited the Compelled Support Clause in a footnote. At oral argument, Chittenden's only contention under the Vermont Constitution was that the Compelled Support Clause should be read as coextensive with the federal Establishment Clause.

directly to student); *Mueller v. Allan*, 463 U.S. 388, 400 (1983) (allowing tax deduction for educational expenses permissible under Establishment Clause because financial benefit is ultimately controlled by private choices of individual parents).

Relying on the logic of these federal cases, plaintiffs argue that as long as benefits are distributed by and/or to neutral parties – the parents – there is no excessive entanglement with religion because there is no connection between public money and religious activities. They make virtually the same argument under the Vermont Constitution, but carry it one step further. Because 16 V.S.A. § 822 *requires* school districts to make tuition payments *directly* to the school, plaintiffs contend that there is no meaningful distinction between payment to a sectarian school chosen by parents and payment to parents who then send the money to a sectarian school.

Plaintiffs' argument is not, as the majority states, that there is no violation of the Vermont Constitution in this case because religious education is distinct from religious worship. See *ante* at 26. Indeed, plaintiffs make quite clear at numerous points in their brief that they want the Court to consider the constitutionality of tuition payments in the specific context of a pervasively sectarian school – a school at which no attempt is made to separate education from worship. Rather, they claim that the Vermont Constitution is not violated by payments to sectarian schools because the "taxes are supporting fellow residents rather than the schools." However persuasive plaintiffs' arguments may be under federal law, these arguments do not address the state constitutional question that we must answer.

In my view, the First Amendment and the Compelled Support Clause cannot be read as parallel provisions. Textually, they differ markedly. The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. As noted, the concern under this clause is whether a particular government action is likely to result in "excessive entanglement" with religion. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The critical question under the Establishment Clause, therefore, concerns the nature of the relationship between the state and the recipient religious organization.

By contrast, the relevant text of Article 3 of the Vermont Constitution states that "no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Vt. Const. ch. I., art. 3. The language of the Compelled Support Clause, on its face, bars the State from taxing citizens for the support of religion. Under the Compelled Support Clause, the insertion of a private decisionmaker between the governmental actor and recipient religious organization will not remedy the constitutional problem with transferring public funds to religious organizations. The critical question under the Compelled Support Clause is not the nature of the relationship between the state and the recipient religious organization, but the nature of the organization receiving public funds. That is, is it a "place of worship"?

Thus, while the religious nature of the recipient institution may not be determinative under the federal framework, it is the question under the Vermont Constitution.

Again, because plaintiffs essentially see the religious nature of MSJ as irrelevant to the constitutionality of the tuition payment scheme (because they argue the payments are controlled by parents rather than the school), they make no argument, nor could they, that MSJ is not a place of worship. In other words, plaintiffs do not even attempt to make any distinction between religious education and religious worship, and it therefore seems unnecessary to undertake a lengthy analysis of this issue.

Nothing in our precedents compels a parallel reading of the Vermont and federal provisions. Plaintiffs contend that both *Swart v. South Burlington School District*, 122 Vt. 177, 167 A.2d 514 (1961), and *Vermont Educational Buildings Financing Agency v. Mann*, 127 Vt. 262, 247 A.2d 68 (1968), support this position. *Swart* held that tuition payments to sectarian institutions were unconstitutional under the First Amendment. In *Mann*, the Court sanctioned participation by a sectarian institution of higher learning in a program that assisted the construction of educational facilities through the use of state tax-exempt bonding. Neither case provides guidance here because, although each alluded to Article 3 of the Vermont Constitution, and *Mann* even went so far as to state that the Vermont Constitution provides no "explicit injunction precluding assistance to sectarian education," 127 Vt. at 269, 247 A.2d at 73, both cases were decided exclusively under First Amendment principles.

Both cases made statements concerning the relative sweep of the state and federal provisions. *Swart* stated that the First Amendment "seems . . . more demanding," i.e., more difficult to satisfy than Article 3. 122 Vt. at 184, 167 A.2d at 518. *Mann* asserted that "[i]n this area, the

limits of the First Amendment of the Federal Constitution are more restrictive." 127 Vt. at 269, 247 A.2d at 73. The suggestion being made by plaintiffs is that, since the tuition payment scheme at issue here would be constitutional under contemporary First Amendment analysis, it must, therefore, be allowable under the supposedly more permissive Vermont Constitution. Especially in light of the manner in which federal jurisprudence has changed in the thirty-to forty-year period since *Mann* and *Swart* were decided, I cannot agree with the proposition that the Vermont Constitution is the more permissive in this area. Furthermore, even if these statements were accurate when made, they were dicta, for in each case, the Court went on to treat the questions as matters to be resolved under First Amendment principles alone. Dicta, it need hardly be stated, have no binding precedential effect.

The present case highlights the problems that occur if we focus our concern on whether the Vermont Constitution is more or less restrictive than the United States Constitution. By doing so, we would lash construction of the Vermont Constitution to the unsteady mast of federal jurisprudence, ensuring that our interpretation will always be in relative terms rather than independently grounded. When federal jurisprudence changes, then our jurisprudence will be required to change as well. In fact, that is why plaintiffs are before us today: because the United States Supreme Court has shifted its Establishment Clause analysis in a way that suggests a more favorable outcome for public support of religious schools. It is preferable that our interpretation of the Vermont Constitution be distinct and freestanding, and that the Court articulate the adequate and independent state

grounds for decisions when the Vermont Constitution is invoked. See *State v. Badger*, 141 Vt. 430, 449, 450 A.2d 336, 347 (1982) (although there are similarities between federal and Vermont constitutions, Vermont Constitution is not mere reflection of federal charter).

If we therefore decline plaintiffs' invitation to collapse Vermont's Compelled Support Clause into the federal Establishment Clause, the resolution of this case – based on the plain language of Article 3 and the facts before us – is clear. It also points clearly to the ways in which the majority unnecessarily complicates our analysis and holding in this case.

First, examining the history of Article 3 adds nothing to the resolution of this case beyond what can be gained from an analysis of the plain language of Article 3. Plain language should be our first resource in interpreting the law, particularly when it provides as clear a guide as the plain language of the Compelled Support Clause does here.[2] Courts in other states that have considered the

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[2] I am as sensitive as the majority to the limitations of the "plain language" approach to constitutional interpretation, and I largely agree with the principles set forth in the majority opinion. See *ante* at 18-21. But the language of a document that is at the center of a controversy is virtually always the starting point for analysis. If one is to go beyond it, there must be reasons for doing so, such as ambiguity in the language, history or precedent that calls its apparent meaning into question, the existence of facts or circumstances that may not have been contemplated when the language was set down, or other factors. It is always an appropriate course to search for such factors, but none have been unearthed here. The majority's search in this case appears to have been triggered by a determination that it was necessary to distinguish between

issue in light of similarly worded compelled-support clauses have concluded that the clause precludes the use of public funds to support sectarian schools. See *Williams v. Board of Trustees*, 191 S.W. 507 (Ky. 1917); *Findley v. City of Conneaut*, 62 N.E.2d 318 (Ohio 1945); *Almond v. Cay*, 89 S.E.2d 851 (Va. 1955).

Second, the majority explicitly refuses to rest its analysis on the facts of this case, stating, "[T]his case is not about MSJ or any other parochial school as such." *Ante* at 10. If this is true, I fail to see the point of the majority's lengthy recitation of facts pertinent to MSJ. Further, why is this case not about MSJ? We are generally bound to construe laws as constitutional, if possible. See *State v. Cantrell*, 151 Vt. 130, 134, 558 A.2d 639, 642 (1989) ("Where possible, a statute must be construed to avoid constitutional infirmities."). We will not declare a law unconstitutional on its face based on the possibility that it might be unconstitutionally enforced in some circumstances. See *Kimbell v. Hooper*, 164 Vt. 80, 88, 665 A.2d 44, 49 (1995). A proper decision in this case must be based on the factual record developed at trial, and the holding should be limited to the constitutionality of the tuition funding statute as applied in this instance.

Having declined to limit itself to the facts of this case, the majority embarks on a lengthy foray into history to address the supposed distinction between religious education and religious worship. Through this exercise, the

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religious education and religious worship, a question I find irrelevant under the facts presented here.

majority attempts to predict when and under what circumstances public funding of sectarian schools would be permissible under Article 3. While these lines may be drawn some day, in a different case, there is no need and no justification on the facts of this case for attempting to do so today. There has been no effort whatsoever on the part of plaintiffs to demonstrate that the MSJ curriculum does not involve the propagation of religious beliefs. In fact, plaintiffs have purposely demonstrated the opposite – that MSJ is pervasively sectarian – in order to test the question of whether public funding of such an institution is constitutional. It clearly is not, and we should limit our holding to that conclusion, rather than speculating about the potential constitutionality of factual situations that are not before us.[3]

/s/ Denise R. Johnson
Associate Justice

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[3] The majority infers that I "would find unconstitutional any subsidy for activities in or by a sectarian school, irrespective of the sectarian nature of those activities." *Ante* at 35, n. 23. It is precisely because of my belief in the primacy of the facts presented in this case that such an inference is wholly unwarranted. If and when such activities come before us, I would address them in their context, as I have attempted to do here.

STATE OF VERMONT SUPERIOR COURT
RUTLAND COUNTY, SS.

DOCKET NO. S0478-96 RcC

CHITTENDEN TOWN SCHOOL DISTRICT,
Plaintiff,

CYNTHIA & DOUGLAS ANDREWS, et al.,
Plaintiff-Intervenors,

v.

VERMONT DEPARTMENT OF EDUCATION,
MARC HULL, Commissioner of Education,
Defendants,

ELIZABETH SOJOURNER, et al.,
Defendant-Intervenors.

IN RE: KENNETH GARROW
DOCKET NO. S0529-96RcC

OPINION AND ORDER

This matter is before the court on the defendant State of Vermont's and plaintiff Chittenden Town School District's cross-motions for summary judgment. The plaintiff-intervenors are Chittenden parents who send their children to Mount Saint Joseph Academy, as well as Chittenden students who attend Mount Saint Joseph academy. The defendant-intervenors are residents and taxpayers of the Town of Chittenden who oppose tuitioning students to Mount Saint Joseph Academy. Given the similarity of issues, the matter of *In re: Kenneth Garrow* has been consolidated with the present action for purposes of this motion. The sole issue for our consideration in this declaratory judgment action is whether tuition payments

made by tuitioning towns directly to sectarian schools are constitutional under the Vermont and United States Constitutions.[1]

BACKGROUND:

The parties filed an agreed statement of facts. Consequently, no findings of fact are necessary. We incorporate the agreed upon facts by reference. The Court appreciates the time and effort that counsel have spent on this matter to reach an agreement on the facts and to present us with accomplished briefing and supporting documentation in the format requested.

Although the Court need make no factual findings, a brief outline of this case from the agreed statement will be helpful. On May 6, 1996, the board of directors of the Chittenden Town School District voted to use public funds to pay tuition on behalf of Chittenden students who attend Mount Saint Joseph Academy, a Roman Catholic high school located in Rutland, Vermont. Because the Town of Chittenden does not maintain a high school, it has provided for the education of its pupils by paying tuition to various public and independent secondary schools approved by the State Board of Education. The parties have stipulated that Mount Saint Joseph academy is pervasively sectarian, in that the secular and sectarian aspects of its educational program are intertwined.

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[1] We do not address the plaintiffs' claims under the Religious Freedom Restoration Act of 1993, (RFRA) 107 Stat. 14488, 42 U.S.C. § 2000bb *et seq. City of Boerno v. Flores*, No. 95-2074 (U.S. June 25, 1997), appears to have resolved the question.

Tuition paid to the school will be deposited into the school's general fund from which it pays its operating expenses. Mount Saint Joseph academy is subject to the authority of the Superintendent of Schools of the Catholic Diocese of Burlington, and is approved as an independent school by the State Board of Education pursuant to 16 V.S.A. § 166(b). The school is subsidized, among other sources, by the Diocese and by local Catholic parishes. Tuition is currently $3,000 for non-Catholic students, $2,775 for baptized Catholics within the Diocese, and $2,525 for baptized Catholics registered within a local parish whose family regularly contributes financially to that parish. The actual cost of educating each student varies, but is around $5,000. According to the parties' stipulation of facts, in the 1995-96 school year, there were eighty-five school districts in the State of Vermont that tuitioned secondary school students to the school of the students' choice. The total number of tuitioned students from these school districts was 6,336.

Chittenden raises revenues to pay for the education of its students, in part, through local taxes levied by the voters on real property within the School District. In addition, Chittenden receives general state aid from funds appropriated by the Vermont Legislature pursuant to 16 V.S.A. § 3497(a). After the board of directors of the Chittenden Town School District approved use of public funds to pay tuition for fifteen Chittenden students who wished to attend Mount Saint Joseph Academy, the State Department of Education, which views the policy as unconstitutional, terminated state aid to the Chittenden Town School District. Chittenden thereupon instituted this lawsuit, subsequently agreeing to a court order whereby Chittenden dropped its request for a preliminary injunction and any

claims for relief other than declaratory judgment in exchange for the Department's agreement to pay general state aid otherwise due to Chittenden. Chittenden also agreed to an injunction enjoining it from paying tuition owed to Mount Saint Joseph academy until this court or a higher court declares that it is constitutional to make such payments.

The defendants assert that the Chittenden Town School District's policy is unconstitutional under both the First Amendment of the United States Constitution[2] and Chapter I, article 3 of the Vermont Constitution.[3] The

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[2] Amendment I provides:
Congress shall make no law respecting an establishing of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[3] Chapter I, Article 3 provides:
That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God: and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

town maintains that it is implementing the provisions of 16 V.S.A. § 822 as written, arguing that the statute authorizes the town to pay tuition for its pupils to attend any Vermont State Board of Education approved public or independent high school. Section 822 provides:

> (a) Each school district shall provide, furnish, and maintain one or more approved high schools in which high school education is provided for pupils unless:
>
> (1) The electorate authorizes the school board to close an existing high school and to provide for the high school education of its pupils by paying tuition in accordance with law. Tuition for its pupils shall be paid to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state; or
>
> (2) the school district is organized to provide only elementary education for its pupils.
>
> (b) For purposes of this section, a school district which provides, furnishes and maintains a program of education for the first eight years of compulsory school attendance shall be obligated to pay tuition for its pupils for at least four additional years.

As the Chittenden Town School District's policy to pay for religious secondary education for its pupils is derived from a state legislative directive, we must examine the constitutionality of the state law, 16 V.S.A. § 822, and not the Chittenden policy itself.

Preliminarily, it must be stated that the plaintiffs have attempted to characterize this as an issue of "choice," and they claim that their rights under the First

Amendment Freedom of Exercise Clause and the Free exercise aspects of the Vermont Constitution are being violated. Specifically, they argue that 16 V.S.A. § 822 is neutral on its face, and that to read to so-called "anti-religious" exception into the statute infringes on their religious freedom. We disagree with this characterization. This is not a case of the state impinging upon the practice of a sincere religious belief. *See State v. Chambers,* 144 Vt. 234, 477 A.2d 110, *cert. denied,* 469 U.S. 875 (1984). All Vermont parents have the right to choose to send their children to parochial schools. *See Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 788 (1973) ("state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause"). Merely by taking the position that the Establishment Clause prohibits the taxpayer funding of a child's religious education, the state is not interfering with the right of parents to choose a religious education for their children. The United States Supreme Court has repeatedly recognized that tension inevitably exists between the Free Exercise and Establishment Clauses, and that often it may not be possible to promote the former without offending the latter. *Nyquist,* 413 U.S. at 788; *Walz v. Tax Comm's,* 397 U.S. 664 (1970). The so-called "anti-religion exception" that plaintiffs claim the defendants are reading into an otherwise neutral tuitioning statute is not state interference with the individual's practice of his or her religion. If the State's position is correct under the Establishment Clause, it is instead a limitation placed by the constitution upon government entanglement with religion. This issue falls squarely under the Establishment Clause.

Before we consider the issue under the federal constitution, we must first address the defendants' argument that the Vermont Constitution provides greater protection against the use of public funds in sectarian schools than does the federal constitution.

VERMONT CONSTITUTION:

Disposition of the federal constitutional issue does not necessarily resolve the state constitutional issue. Our Vermont Supreme Court has stated that the "Vermont Constitution is the fundamental charter of our state, and it is this Court's duty to enforce the constitution." *State v. Badger,* 141 Vt. 430, 448, 450 A.2d 336 (1982). "Our constitution is not a mere reflection of the federal charter." *Id.* Rather, it is "an independent authority, and Vermont's fundamental law." *Id.* at 449. The United States Supreme Court has stated that state courts are free to construe their state constitutions as providing different or even greater constraints on government action than those found in the United States Constitution. *California v. Greenwood,* 486 U.S. 35, 43, 108 S.Ct. 1625, 1630 (1988). Hence, we must examine the protections provided by both constitutions.

At issue is whether the language of Chapter I, Article 3 of the Vermont Constitution provides an independent and more prohibitive basis for review of the Establishment Clause claim than is provided by federal jurisprudence under the Establishment Clause of the First Amendment. "A number of approaches are available in construing our constitution, including historical analysis,

examination of the text, constructions of identical or similar provisions in other state constitutions, and use of sociological materials." *State v. DeLaBruere*, 154 Vt. 237, 262-263, 577 A.2d 254, 268 (1990).

Upon review of the Vermont Supreme Court's decisions, we find that the Court has not specifically addressed the relationship between our state's Establishment Clause and the federal Establishment Clause.[4] The Court has, however, examined the relationship between the state and federal Free Exercise Clauses. In *DeLaBruere*, the Court found that the Free Exercise Clause in Chapter I, Article 3, does not offer more protection than the First Amendment, and so the Court analyzed the case under the First Amendment. *State v. DeLaBruere*, 154 Vt. 237, 265 (1990).

Two Vermont cases interpret Chapter I, Article 3 and the Establishment Clause, but neither case specifically addressed the issue of which establishment clause, state or federal, should control. *See Swart v. South Burlington Town School District*, 122 Vt. 177, 167 A.2d 514, *cert. denied*, 366 U.S. 926 (1961); *Vermont Educational Buildings Financing Agency v. Mann*, 127 Vt. 262, 247 A.2d 68, *dismissed*, 396 U.S. 801 (1968). While the Court purported in *Swart* to find that the First Amendment was the more demanding, the Court later explained in *DeLaBruere* that its conclusion in *Swart* actually related to the protection of the free

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[4] The prohibition against state establishment of religion is found in the following language of Chapter I, Article 3 of the Vermont Constitution: " . . . and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister. . . . "

exercise of religion, and not to protection against the establishment of religion. *State v. DeLaBruere*, 154 Vt. 237, 265. In *Mann*, the court noted that in establishment of religion cases, the limits of the First Amendment are more restrictive. *Mann* at 269. However, the *Mann* court did not conduct any analysis to arrive at its conclusion, instead it relied upon the conclusion drawn in *Swart*, which was later modified by *DeLaBruere*. In another Establishment Clause case decided under the First Amendment, *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 641 A.2d 352 (1994), the Court did not reach the question because the defendant did not make a separate claim under Chapter I, Article 3 of the Vermont Constitution. As the Court has not yet addressed the Establishment Clause in the Vermont Constitution, we must look to other sources.

The usual starting point for this type of discussion is a review of the legislative history to determine the intent of the framers. Although no party has provided us with any Vermont legislative history, the Court in *Swart* has provided some background on the origins of Article 3. Chapter I, Article 3 of the Vermont Constitution was adopted from the Pennsylvania model. *Swart v. South Burlington*, 122 Vt. 177, 182 (1960). The Vermont framers were fearful, however, that the religious liberty of the Pennsylvania Constitution would be somewhat more expansive than that to which the people of New England had been accustomed. *Swart*, 122 Vt. at 182, citing Chipman, *A Memoir of Thomas Chittenden* (1849). So the Vermont framers considered it necessary to adapt the constitution to the "religious sentiments, habits and customs of the people of the state." *Id.*

Early on, Vermont encountered conflict between religion and the state.

> "The framers of our Constitution, having, as suggested, founded it on the equal rights of the citizens, and having pretty correct notions of religious liberty, had no idea of authorizing the Legislature to tax the minor sects for the benefit of the standing order, yet they considered that as all classes of the community had a common interest in the support of public worship, as they had in support of the common schools, they ought to contribute in like manner for its support."

Swart, 122 Vt. at 183, citing Chipman, *A Memoir of Thomas Chittenden* (1849).

> "And they authorized the Legislature to pass laws to enforce the observation of the Sabbath, and to tax the people for the support of public worship, trusting that they would do it in such manner as to afford no just ground of complaint. . . . "

Swart, 122 Vt. at 183. (Referring to the final clause in Chapter 1, Article 3). The legislature passed laws to carry the above concept into effect, culminating in the Ministerial Act of 1783. *Id.* This act provided taxing authority "enabling towns and parishes to erect proper houses for public worship, and support ministers of the gospel." *Id.*

According to Daniel Chipman, the Ministerial Act was a constant source of discord and resentment among minority denominations until the legislature repealed the act, divesting towns of their power. *Swart*, 122 Vt. at 183. "At length the people spoke to the Legislature in a language that could not be misunderstood, . . . we will not

permit the Legislature to interfere in any manner with our religious concerns. Thus it has been left to every individual to decide for himself whether he would make contribution for the promotion of these objects." *Id.* This history is different from the historical origin of the First Amendment.

According to the Court in *Swart*, the First Amendment of the United States Constitution was the product of a "more intense and far-reaching conflict." *Swart* at 183. The First Amendment was the child of the battle to defeat a Virginian "Bill Establishing a Provision for Teachers of the Christian Religion," which was designed to enforce tax support for the established church. *Id.* at 183, 184. Based on this history, the Vermont Supreme Court found that "in the domain of religious liberty, the resolute history of the First Amendment seems the more demanding." *Id.* at 184. As mentioned earlier, this holding has been limited to the Free Exercise clause of the Vermont Constitution, and has not been extended to the 'no compelled support' clause by the Court.[5] *See State v. DeLaBruere*, 154 Vt. 237.

The defendant and defendant-intervenors urge us to compare the compelled support language of Chapter 1,

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[5] In this opinion, we will use the term 'compelled support clause' to refer to the clause found in many state constitutions, including Vermont's, prohibiting establishment of religion by the state, i.e. " . . . no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience . . . " VT. CONST. ch. I, art. 3.

Article 3 with similar language in other state constitutions. Of the twenty-two states cited by the defendants as having constitutions prohibiting compelled support of religion, we will limit our examination to only those approximately fourteen states with constitutions similarly modeled on the Pennsylvania Constitution. *See State v. DeLaBruere*, 154 Vt. 237. Of those fourteen states, eleven, including Vermont, have constitutions containing compelled support clauses, although the language varies.[6] The constitutions of some of those eleven states also contain language, in addition to the "no compelled support" clause, which specifically prohibits state funding of sectarian institutions.

Of the eleven states, three states found their constitution provided coextensive protection with the federal constitution[7], four states which possess additional

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[6] Arkansas (ARK. CONST. art. II, § 24); Indians (IND. CONST. art. I, § 4); Kansas (KAN. CONST. Bill of Rights, § 7); Minnesota (MINN. CONST. art. I, § 16); Missouri (MO. CONST. art. I, §§ 6, 7); Ohio (OHIO CONST. art. I, § 7); Pennsylvania (PA. CONST. art. I, § 3); Tennessee (TENN. CONST. art. I, § 3); Texas (TEX. CONST. art. I, §§ 6, 7); Wisconsin (WIS. CONST. art. I, § 18).

[7] *See Simmons-Harris v. Goff, (Gatton v. Goff)*, No. 96 APEO8-982 and No. 96 APEO8-991 (Ohio Ct. of Appeals, May 1, 1997), citing *Findley v. City of Conneaut*, 62 N.E.2d 218 (Ohio 1945); *Lazarus v. Bd. of Commrs. of Hamilton County*, 217 N.E.2d 883 (Ohio 1966); *P.O.A.U. v. Essex*, 275 N.E.2d 603 (Ohio 1971), (Section 7, Article I of Ohio Constitution and "school funds" clause of Section 2, Article VI are coextensive with protection afforded by the Establishment clause); *Center Township of Marion County v. Coe*, 572 N.E.2d 1350 (Ind.App.2 Dist 1991) (Court found reimbursement of private emergency shelters that required attendance at religious services violated both the

constitutional provisions limiting expenditures of state funds for sectarian education or other sectarian purposes found their state constitution more restrictive than the

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Establishment Clause and Article I, Section 4 of the Indiana Constitution; Court also found practice violated Article I, Section 6 of the Indiana Constitution, which prohibits spending public money for the benefit of any religious or theological institution); TEX. CONST. art. I, section 7, Interpretive Commentary (Constitution Revised December 1, 1996) (Section 7, prohibiting use of public funds to support religion, was added in 1876 specifically to prevent state funds from being spent on private sectarian education. Further, article VII, section 5 was added declaring that the permanent school fund was never to be appropriated to or used for the support of sectarian schools. Article I, Sections 6 and 7 combined "precludes the state from establishing a religion, from aiding a religion, from aiding all religions, or from preferring one religion over another. A wall of separation between church and state is created." "Although separation of church and state in adequately provided for by these provisions of the State Constitution," the First Amendment is applicable to the state through the Fourteenth Amendment, and also has been interpreted to "prevent the state from establishing religion or a state church and from aiding any church or religious body by the appropriation of public money." The Texas legislature, explaining to what extent religion and law may intermingle (incorporation, tax exemption), suggests in the interpretive commentary that public funds can be used to provide school books and free busing to private sectarian school students, citing U.S. Supreme Court decisions. By referring to U.S. Supreme Court interpretation of the First Amendment to describe the extent to which religion and state may intermingle without violation of the Texas Establishment Clause, the interpretive commentary suggests that the federal and Texas Constitutions might be considered coextensive).

federal constitution[8], and four states, including Vermont, had not yet addressed the issue. The other three states which have not yet addressed the issue are Arkansas, Kansas, and Tennessee.

Unlike states whose constitutions, in addition to their compelled support clauses, contain specific prohibitions against expenditure of public funds on sectarian education and institutions, Vermont has no such specific prohibition. Of the eleventh states examined, no state without such additional provision found its constitution more prohibitive than the federal Constitution. Rather, such states found their constitutional compelled support clause coextensive with the federal Establishment Clause. Vermont's constitution is identical to those states who

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[8] *See State ex rel. Wisconsin Health Facilities v. Linder*, 280 N.W.2d 773, 783 (Wis. 1979) (the additional language "nor shall any money be drawn from the treasury for the benefit of religious societies" renders Wisconsin's clause more prohibitive than the First Amendment); *Americans United v. Rogers*, 538 S.W.2d 711, *cert. denied*, 97 S.Ct. 653, 429 U.S. 1029, 50 L.Ed.2d 632 (Mo. 1976) (Missouri constitution is more restrictive than the First Amendment in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state); *Americans Unit, Inc. as Pro., etc. v. Ind. Sch. D No. 622*, 179 N.W.2d 146, *dismissed*, 403 U.S. 945, 29 L.E.2d 854, 91 S.Ct. 2275 (Minn. 1970) (Minnesota Constitution more restrictive than First Amendment due to the constitutional limitation in Minn.Const. art. 8, §2, prohibiting the appropriation of public money for the support of schools wherein religious doctrines are taught); *Rhoades v. School District of Abington Township*, 226 A.2d 53, *cert. denied*, 389 U.S. 846, *dismissed*, 389 U.S. 11, 19 L.Ed.2d 7, 88 S.Ct. 61 (Pa. 1967) (state constitution more restrictive).

found their constitutional compelled support clause coextensive with the federal Establishment Clause. Based on this instructive comparison and the history of Vermont's provision, we find that the protections granted by the Vermont Constitution are at least coextensive with, rather than more prohibitive than, the federal constitution.

Vermont's history and solid rejection of compelled contributions through taxes for the support of religion, as illustrated by early outcry against legislative attempts such as the Ministerial Act, reveals the importance to Vermonters of the freedom from compelled taxation. The "no compelled support" language of Chapter 1, Article 3 itself specifically focuses us on the prohibition against taxpayer involvement. Although the provisions of Chapter I, Article 3 seem more specific than the Establishment Clause of the First Amendment, we read them to embody the same values of governmental noninvolvement as secured by the Establishment Clause of the First Amendment. Since the Vermont provision is at least coextensive with the First Amendment, our analysis will follow the First Amendment jurisprudence.[9]

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[9] As the defendants point out, textually, the Vermont Constitution is explicit in prohibiting the government from compelling an individual to erect or support any place or worship or to support any minister, contrary to one's conscience. This language explicitly prohibits taxing of one citizen to pay for the church of another citizen. The defendants make an attractive argument that in this regard the Vermont Constitution is more prohibitive than the Federal Constitution, at least as to the taxing of citizens for the support of religious schools. We are reluctant to adopt the argument here, since our own state Supreme Court has not yet addressed the issue, and three states with constitutions based on the Pennsylvania

UNITED STATES CONSTITUTION:

The provisions of the First Amendment were made applicable to the states with the ratification of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). On questions arising under the First Amendment, the decisions of the Supreme Court of the United States are controlling upon this court. *Swart v. South Burlington Town School District*, 122 Vt. 177 (1961).

In 1961, the Vermont Supreme Court decided *Swart v. South Burlington Town School District*, 122 Vt. 177 (1961). In *Swart*, the South Burlington School District paid tuition to a variety of state schools, including parochial high schools operated by the Roman Catholic Diocese of Burlington, in order to fulfill its statutory obligation to provide residents with secondary education. *Id.* at 179. A resident of the school district sued to enjoin the school district from paying tuition to area Catholic high schools. *Id.* at 178. The Court applied the jurisprudence of the time under the First Amendment, and held that tuition payment to parochial schools would support religion in violation of the Establishment Clause. *Id.* at 188.

Three decades later, the Vermont Supreme Court questioned the continued validity of its 1960's era evaluation of the federal Establishment Clause, noting that its earlier opinion "refer[red] to a First Amendment jurisprudence that has evolved markedly." *Campbell v. Manchester Bd. of School Directors*, 161 Vt. 441, 448 (1994). The *Swart*

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model, and similar to our own, have found the compelled support provision co-extensive with the First Amendment.

opinion would appear directly on point, thereby controlling the outcome of the case before us. However, following the suggestion in *Campbell*, we review the evolving federal Establishment Clause jurisprudence.

The United States Supreme Court has repeatedly acknowledged the difficult issues of interpretation and application raised by the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 392 (1983); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Court has reiterated that the line between permissible and impermissible governmental financial assistance to sectarian institutions is narrow and difficult to define. *Mueller*, 463 U.S. at 393 (citing *Lemon*, 403 U.S. at 612). In an attempt to clarify the appropriate boundaries, the Court has adopted a three-part test to determine whether a statute complies with the Establishment Clause. *Lemon*, 403 U.S. at 612. A statute does not violate the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. *Id.* at 612-13.

These factors should be [sic] not be seen as establishing the precise limits of the Establishment Clause, but "serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger*, 421 U.S. 349, 359 (1975). Courts must carefully examine the law to determine "whether it furthers any of the evils against which that Clause protects. Primary among those evils have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756,

772 (1973) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) and *Lemon*, 403 U.S. at 612). In sum, the Establishment Clause prohibits state and federal governments from passing laws which have either the purpose or effect of advancing or inhibiting religion. *Agostini v. Felton*, Nos. 96-552 & 96-553, 1997 WL 338583, at *9 (U.S. June 23, 1997).

I.

The first prong of the *Lemon* test examines the purpose of the state legislation to discern whether such purpose is secular in nature. It is clear that the purpose of 16 V.S.A. § 822 (a) is to provide for the education of Vermont's high school age students. There is no indication of a purpose to promote sectarian education. While the school district must pay full tuition to a chosen public school, tuition for a private school is paid only at the "average announced tuition of Vermont union high schools for the year of attendance" unless the school meets Vermont public school approval standards or the paying district votes a higher rate. 16 V.S.A. § 824 (b)-(c). We find that 16 V.S.A. § 822 is neutral towards religion, and thus secular in nature.

The Vermont Supreme Court has twice considered Vermont's educational statutes in the context of the Establishment Clause, finding neutrality on both occasions. *See Swart v. South Burlington Town School District*, 122 Vt. 177, 188 (1961), and *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 454 (1994). In *Campbell*, ruling on a tuition reimbursement scheme not explicitly authorized by, but stemming from 16 V.S.A. § 822, the

Court quickly disposed of the first prong of the *Lemon* test stating "There is no question that the purpose of the statutory scheme is to provide educational opportunity for school-age children while offering educational choice . . . . there is no indication of a purpose to aid sectarian education. There is clearly a valid secular purpose for the tuition reimbursement scheme." *Campbell*, 161 Vt. at 454. The legislature has not changed § 822 since the Supreme Court's decision in *Campbell*. In light of the above, we also find that 16 V.S.A. § 822 is neutral towards religion, and thus is secular in nature. Section 822 does not violate the first prong of the *Lemon* test.

II.

While the first prong of *Lemon* examines the legislative purpose of the challenged statute, the second prong focuses on the program's effect. A law violates the Establishment Clause if its principal or primary effect either advances or inhibits religion. *Lemon*, 403 U.S. at 612. This does not mean the Clause is violated every time "money previously in the possession of a state is conveyed to a religious institution." *Witters v. Washington Department of School for the blind*, 474 U.S. 481, 486 (1986). A state program or statute that has an incidental and indirect effect beneficial to a religious entity is not invalid under the Establishment Clause. *Nyquist*, 413 U.S. at 775. Instead, the Establishment Clause is violated where the effect of the aid is "that of a direct subsidy to the religious school from the State." *Witters*, 474 U.S. at 487. In other words, government aid cannot directly and substantially advance the sectarian enterprise of the school

or finance religious indoctrination. *Agostini*, 1997 WL 338583, at *10.; *Meek*, 421 U.S. at 366.

Recently, the United States Supreme Court has struggled over delineating the boundary between permissible and impermissible governmental financial assistance to sectarian schools. *Nyquist*, 413 U.S. at 775; *see generally Agostini*, 1997 WL 338583. Despite the Court's struggle and evolving jurisprudence, the Supreme Court has consistently and unhesitatingly found that direct governmental subsidies to sectarian entities violate the Establishment Clause. *Nyquist* at 775; *see Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993).

A.

The relevant question in determining whether public funds subsidize religion is whether the effect of the aid is "direct and substantial," *Nyquist*, 413 U.S. at 784-85 n.39, or "indirect and incidental," *Grand Rapids School District v. Ball*, 473 U.S. 373, 394 (1985), *overruled in part by Agostini*, 1997 WL 338583, at *15. The difference between the two is "one of degree." *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Thus, although the government may permissibly loan secular textbooks to schoolchildren attending religious schools, *Board of Education v. Allen*, 392 U.S. 236, 243-244 (1968), the state may not loan instructional equipment and materials directly to religious schools. *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek*, 421 U.S 349 (1975).

The New York law challenged in *Allen* required local public school authorities to lend secular textbooks to all public and nonpublic school students in grades seven

through twelve. *Allen*, 392 U.S. at 238. The United States Supreme Court concluded that this program did not violate the Establishment Clause, in part, because "the law merely makes available to all children the benefits of a general program to lend school books free of charge" *Allen*, 392 U.S. at 243. The Court continued that "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." *Id.* at 243-44.

The Court rejected the Board of Education's argument that because books are critical to the teaching process and, in a sectarian school, that process is used to teach religion, then the state's provision of textbooks to religious school students would assist in the process of teaching religion. *Allen*, 392 U.S. at 248. The Court could not agree "either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Id.*[10]

A similar program, implemented in Pennsylvania, was also found to be constitutional by a plurality of the United States Supreme Court in *Meek v. Pittenger*, 421 U.S. 349 (1975).[11] Two other programs adopted by Pennsylvania, however, were found to be unconstitutional. One

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[10] In reaching its decision in *Board of Education v. Allen*, the United States Supreme Court emphasized that the case was before it after summary judgment on the pleadings. *Allen*, 392 U.S. at 248. Consequently the Court was limited by the meager record before it. *Id.*

[11] Justice Brennan wrote a concurring and dissenting opinion, which was joined by Justices Douglas and Marshall, in

program authorized the direct loan of instructional equipment and material to nonpublic schools. The Court concluded that in light of the substantial amount of direct aid which the school received, the issue of whether the sectarian nature of the institution was advanced was not resolved by the fact that loaned materials, such as charts and laboratory equipment, were purely secular in nature. *Meek*, 421 U.S. at 365.

> [I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religions role performed by many of Pennsylvania church-related elementary and secondary schools and to then characterize [this program] as channeling aid to the secular without providing direct aid to the sectarian.

Id.

A similar program developed in Ohio was also invalidated in *Wolman*, 433 U.S. at 249-50. In developing this program, the Ohio legislature attempted to comply with the Court's holding in *Meek* by loaning the instructional material and equipment, such as slide projectors, globes, tape recorders and science kits, to parents and students, rather than the religious school. *Id.* at 250. The Court found it was irrelevant if the equipment went the [sic] school or to the pupil.

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which he stated that the textbook loan program at Issue in *Meek* was different from the program in *Allen* and should be declared unconstitutional. *Meek*, 421 U.S. at 378. He also indicated that the record in the present case, unlike that in *Allen*, demonstrated that the nonpublic school in Pennsylvania was more than a "conduit between the State and pupil". *Id.* at 379.

> Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be sorted and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

Id.

Although the Court in *Meek* could not differentiate between aid to the secular purpose and the sectarian mission of the religious school, the Court has recently reiterated that not all government aid that directly benefits the educational function of religious schools violates the Establishment Clause by impermissibly financing religious indoctrination. *Agostini*, 1997 WL 338583, at *10; *see Witters*, 474 U.S. 481, 489 (1985) (Establishment Clause did not bar state from providing tuition grant under vocational rehabilitation program to blind student attending Christian college); *Zobrest*, 509 U.S. at 12 (provision of sign language interpreter to student at Roman Catholic high school does not constitute direct subsidy to religious school because school is not relieved of expense it otherwise would have to assume). The critical issue is whether the nature and substance of the aid to the educational function of a sectarian school serves to finance or encourage the religious indoctrination which also occurs in sectarian schools. *Agostini*, 1997 WL 338583, at *10.

In *Agostini*, the United States Supreme Court reconsidered and overruled its prior decisions in *Aguilar v.*

Felton, 473 U.S. 402 (1985) and in the companion case, *Grand Rapids School District v. Ball*, 473 U.S 373 (1985), in light of recent Establishment Clause cases. The programs at issue in both *Aguilar* and *Grand Rapids* sent public school teachers into parochial schools to provide remedial education to disadvantaged children. *Agostini*, 1997 WL 338583, at *7-9. The classes, which were taught during regular school hours, were designed to supplement the course curriculum of the nonpublic schools, rather than supplant services already provided. *Id.* at *7.

In 1985, when *Grand Rapids School District* was decided, the Court held that the educational program at issue therein violated the Establishment Clause in three ways. *Id.* at *8. Initially, the Court observed that since public school teachers would be conducting classes in parochial schools, in an atmosphere dedicated to the advancement of religious belief, the teachers may, either intentionally or inadvertently, become involved in inculcating religious beliefs. *Grand Rapids School District*, 473 U.S. at 385-86. Second, the Court noted that the presence of public school teachers in parochial schools would create a "symboic union" between church and state, especially in the minds of the students. *Grand Rapids School District*, 473 U.S. at 390-91. Finally, the Court found that the program sponsored by the Grand Rapids School District would subsidize the primary religious mission of the institutions affected. *Id.* at 396-97.

> Distilled to essentials, the Court's conclusion that the Shared Time program in [*Grand Rapids School District v. Ball*] had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who

> works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision making.

Agostini, 1997 WL 338583, at *9.

Although these assumptions were firmly rooted in Establishment Clause cases decided prior to *Aguilar* and *Grand Rapids School District*, the Court's "more recent cases have undermined" their validity. *Id.* In overruling *Aguilar* and *Grand Rapids School District*, the Court first emphasized that there is no evidence that any public school instructor teaching in a classroom in a sectarian school had attempted to inculcate religion in students, nor is there is [sic] any "reason to presume that, simply because she enters a parochial school classroom, [the instructor] will depart from her assigned duties and instructions and embark on religious indoctrination." *Agostini*, 1997 WL 338583, at *11. Moreover, the Court found it inappropriate to assume that the mere presence of public school teachers in parochial schools, without more, will create a "symbolic union" between church and state. *Id.* Finally, the Court found that public aid which benefits the educational function of a parochial school does not impremissibly advance its sectarian mission, when the aid does not relieve sectarian schools of costs they otherwise would have borne and where no public monies reach the coffers of religious schools. *Id.* at *12.

Applying these new Establishment Clause postulates to the educational programs in *Aguilar* and *Grand Rapids School District*, the Court held that:

> a federally funded program providing *supplemental, remedial instruction* to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such *instruction is given* on the premises of sectarian schools *by government employees* pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this *carefully constrained program* also cannot reasonably be viewed as an endorsement of religion.

Id. at *14 (Emphasis added).

Although the United States Supreme Court's decision in *Agostini* expands the type of government aid that may benefit sectarian schools, it reaffirms the importance of the core Establishment Clause principles. *Id.* at *9. The Court continues to consider whether the purpose or effect of the aid either promotes or inhibits religion. *Id.* In reaching its decision in *Agostini*, the Court emphasized (a) that government funds did not directly relieve "the sectarian schoo[l] of the costs [it] otherwise would have borne in educating [its] students," *Agostini*, 1997 WL 338583, at *11, quoting *Zobrest*, 509 U.S. at 12; (b) that public funds never reached the coffers of religious schools, *id.* at *12; and (c) that the instructors were government employees, not employees of a religious school. *Id.* at *14. Chittenden's proposed policy goes far over the lines drawn in *Agostini* and violates Chapter I, Article 3 of the Vermont Constitution and the Establishment Clause of the United States Constitution.

Unlike the "carefully constrained program" in *Agostini*, which the Court found did not violate the Establishment Clause, the "unconstrained" and unrestricted Chittenden tuition payments directly impinge upon the core principles. First, unlike *Agostini* where the Court emphasized that no public funds would go into the coffers of religious schools, *id.* at *12, the Chittenden tuition payments would go directly to the coffers of Mount Saint Joseph Academy for its unrestricted use. The Sisters of Saint Joseph, the religious order which owns Mount Saint Joseph Academy, can use the money to buy math textbooks, laboratory equipment, and computers, or to repair the church, buy Bibles, or pay teachers to teach theology. Such "unconstrained" payments are not authorized by *Agostini*.

Second, the Chittenden tuition payments would relieve Mount Saint Joseph Academy of costs that it would other wise have to bear in educating its students. Whereas, in *Agostini*, the public funds were used to provide supplemental and remedial educational programming that would not otherwise be provided to nonpublic school students, *Agostini*, 1997 WL 338583, at *12, the funds in the present case go directly into the general operating budget of the institution to assist in financing Mount Saint Joseph's core curriculum, relieving the school of expenses it would otherwise incur.

Finally, the Court in *Agostini* concluded that the mere presence of public school employees in parochial schools does not create a "symbolic union" between church and state. *Id.* at *10. In the present case, however, public funds would be used to pay employees of a religious institution, who are bound by their contract to incorporate the

teachings of the Roman Catholic Church into their classes. This subsidization would not only create a "symbolic union" between church and state, it would create an actual and direct link. Publicly raised tax dollars would flow directly from the state to Mount Saint Joseph Academy. Under this system, it would be impossible for students or taxpayers to distinguish governmental funding of educational services and public assistance and support of the religious beliefs taught there. Unlike *Agostini*, where students and taxpayers can understand that public funds are being used solely to teach remedial courses in math, science and other core subjects, Chittenden students would not be able to differentiate between those activities funded by the state and those funded by the religious institution, because in effect, there would be no difference.

B.

Initially, the plaintiffs argue that the tuitioning system at issue in the present case is virtually identical to the student assistance programs in higher education. In the financial assistance programs for higher education, state and federal authorities send loan and grant money directly to the colleges and universities chosen by the students and parents, regardless of whether the college or university is religiously-affiliated. The plaintiffs argue that if loan and grant money can be sent directly to religious colleges and universities through government financial assistance programs, then Chittenden should also be allowed to do so given the similar nature between Chittenden's tuitioning system and the higher education financing programs.

Although the mechanics of Chittenden's tuitioning program resemble the procedure used in higher education financial assistance programs, the plaintiffs overlook an abundance of federal case law highlighting the different role the state plays in secondary education and higher education. First, the State of Vermont has no constitutional or statutory duty to provide its young adults with post-secondary education. Moreover, attendance at institutions of higher education is purely voluntary. On the other hand, the State has a constitutional duty to provide every school-age child with an equal educational opportunity. *Brigham v. State of Vermont*, 8 Vt.L.W. 41, 48, 692 A.2d 384 (1997). Moreover, every school district has a statutory duty to provide a high school education to its children. 16 V.S.A. § 822 (a) Finally, the state mandates that children under the age of sixteen attend school. 16 V.S.A. § 1121. Thus, where a school district seeks to comply with that statutory and constitutional duty by tuitioning its students to a religious school, a direct link between religion and the state is formed. For this reason, the United States Supreme Court has been particularly vigilant in monitoring compliance with the

> Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

Additionally, the United States Supreme Court has recognized the inherent differences in the nature of secondary education and higher education. In *Tilton v. Richardson*, the United States Supreme Court explained:

> there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical response from their students.

403 U.S. 672, 685-86 (1971) (citations omitted).

Because of the critical role that the State plays in elementary and secondary school education and the inherent differences in the nature of elementary and secondary school education from higher education, we do not believe we are bound by federal case law regarding financial assistance programs in higher education.

C.

Next, the plaintiffs argue that, unlike *Meek* and *Allen*, the Chittenden Town School District would not be providing "aid" to Mount Saint Joseph Academy, but rather would be making payments for the service of providing education. We find this argument meritless. Taken to its logical conclusion, that would mean the Establishment Clause would not be violated if the State paid the Catholic church to administer its social welfare program and paid the Methodist church to administer the State's correctional program. According to the plaintiffs, public monies would not "subsidize" religion, but merely pay the religious organization for services rendered.

Moreover, the plaintiffs' argument was implicitly rejected in *Nyquist*. In *Nyquist*, the State of New York implemented a program whereby direct and unrestricted grants were provided to low-income parents who sent their children to nonpublic schools to reimburse them for tuition payments. Initially, the United States Supreme Court noted that the Establishment Clause would clearly prohibit giving these grants directly to the sectarian schools. *Nyquist*, 413 U.S. at 780. In fact, what the Chittenden Town School District proposes to do in the present case is to provide such unrestricted grants to a pervasively sectarian school as tuition payments.

In addition to the tuition reimbursement program for low-income families, the Court in *Nyquist* also invalidated a program that provided "maintenance and repair" grants to nonpublic schools. After examining the maintenance and repair grants, the Court concluded that without appropriate restrictions on the monies, the sectarian

schools could use the money to maintain and repair a chapel or a classroom where religious education was taught. Accordingly, the Court found that it could not deny that the grant would have a primary effect of advancing religion, "in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." *Nyquist*, 413 U.S. at 774.

In invalidating the programs in *Nyquist*, the court distinguished the programs described from three of its prior cases which upheld public financial assistance to sectarian schools. *See Everson v. Board of Education*, 330 U.S. 1 (1947) (reimbursed parents for public transportation costs incurred by students attending public and nonpublic schools); *Board of Education v. Allen*, 392 U.S. 236 (1968) (provided secular textbooks to all children in grades 7-12 in both public and nonpublic schools); *Tilton v. Richardson*, 403 U.S. 672 (1971) (provided federal grants for construction of facilities used only for secular purposes). Specifically, the Court concluded that *Everson*, *Allen*, and *Tilton* recognize that some financial assistance may be channeled to the secular functions of a religious school without providing direct aid to the sectarian nature of the institution. *Nyquist*, 413 U.S. at 775. In *Everson*, *Allen*, and *Tilton*, the State was providing "neutral, nonideological aid" which assisted "only the secular functions of sectarian schools, [and] served indirectly and incidentally to promote the religious function" of the school. *Id.* The ultimate effect of the programs in *Nyquist*, however, was to support the religious enterprise of the school, given "the absence of an effective means of guaranteeing that the state aid derived from public funds will

be used exclusively for secular, neutral, and nonideological purposes." *Nyquist*, 413 U.S. at 780.

The identical problem arises when the Chittenden Town School District pays tuition monies to Mount Saint Joseph Academy. Without restrictions outlining the permissible use of these monies, no one can be assured that public funds will not be used to promote and advance the religious mission of Mount Saint Joseph Academy. Unlike the funding in *Everson*, *Allen*, and *Tilton*, in this case public money will go directly to Mount Saint Joseph Academy for its general use. There can be no question that such payments would provide direct and substantial benefit to a religious entity. It is clearly these types of direct cash payments from public funds to religious institutions that the Establishment Clause prohibits.

D.

Finally, the plaintiffs argue that the Chittenden Town School District would not be providing "direct and substantial" aid to Mount Saint Joseph Academy if it made tuition payments to the school. Instead, the plaintiffs argue that such payments would only indirectly and incidentally benefit the sectarian nature of the school, because the payment of public funds to the sectarian school occurs only as a result of independent parental choice. In support of their position, the plaintiffs cite *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

These cases hold that the Establishment Clause was not intended to prohibit sectarian schools from receiving an attenuated financial benefit from the State as a result of an independent parental choice. However, these cases do not overrule the well-established principle that the payment of unrestricted public funds into the general operating budget of a religious institution provides direct and substantial aid thereto. Moreover, as the defendant-intervenors correctly point out, the facts in all three cases, including the nature of the benefit to the sectarian schools, are distinguishable from the present case.

In *Mueller*, the United States Supreme Court upheld a Minnesota tax deduction for educational expenses available to all parents with children in public and nonpublic elementary and secondary schools. *Mueller*, 463 U.S. at 402. Although the Court had struck down a tax deduction in *Nyquist*, the Court distinguished Minnesota's program by emphasizing that is tax deduction was available to all parents, not just those parents with children in nonpublic schools, as was the case in *Nyquist*. *Id.* at 397-98. Moreover, the Court noted that the tax benefit struck down in *Nyquist* was not a true tax deduction, but was rather a "thinly disguised tuition grant," which was specifically designed to aid nonpublic schools. In this context, the Court further stated that:

> by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject . . . Public funds become available only as a result of numerous private choices of individual parents of school age children.

Id. at 399. The Court concluded that the Establishment Clause's prohibition does not extend to this type of tax deduction. *Id.* at 400.

> The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Mueller, 463 U.S. at 400.

Three years later, the Court held that the Washington Commission for the Blind could provide aid, under a statutory vocational rehabilitation program, to fund plaintiff's training at a private Christian college, where he was studying to become a pastor or youth director. *Witters*, 474 U.S. at 485. The Court noted that Washington's vocational rehabilitation program was a neutrally available program intended to assist the visually impaired obtain the maximum amount of self-sufficiently. Moreover, the assistance is provided directly to the student who then provides it to the education institution of his or her choice. Thus, the Court concluded, "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S at 487.

The Court further found that the vocational rehabilitation program is "not one of 'the ingenious plans for channeling state aid to sectarian schools.' " *Id.* at 488. Importantly, the vocational rehabilitation program is not well suited to serve as a vehicle to provide subsidies to

sectarian institutions, and "nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Witters*, 474 U.S. at 488.

Similarly in *Zobrest*, the Court held that the Catalina Foothills School District could provide a hearing impaired student, enrolled in a sectarian school, with a publicly employed sign language interpreter, *Zobrest*, 509 U.S. at 3. In sum, the Court concluded that the provision of a sign language interpreter to a hearing impaired student "does not amount to an impermissible 'direct subsidy' " of the sectarian school. *Zobrest*, 509 U.S. at 12. "[A]ny attenuated financial benefit that parochial schools do ultimately receive from [this program] is attributable to the 'private choices of individual parents.' " *Id.* (quoting *Mueller*, 463 U.S. at 400). Importantly, the court also stated that this was an easier case than *Mueller* and *Witters*, because under this program,

> No funds traceable to the government ever find their way into sectarian schools' coffers. The only indirect economic benefit a sectarian school might receive by dint of [this program] is the disabled child's tuition – and that is, of course, assuming that the school makes a profit on each student; that, without a [public paid] interpreter, the child would have to school elsewhere; and that the school, then, would have been unable to fill that child's spot.

Zobrest, 509 U.S. at 10-11.

Despite the plaintiffs' contrary assertions, these cases do not hold that aid becomes "indirect and incidental"

merely because the funds reach particular sectarian schools only as a result of parental choice. Each of these cases involved a sectarian school receiving an attenuated financial benefit, which became more indirect because payment to the sectarian school only occurred following an individual's choice to attend that school. The primary beneficiaries of the assistance in *Mueller, Witters,* and *Zobrest* were individual families or students. Furthermore, the programs at issue did not provide a method by which sectarian schools could obtain consistent and substantial financial assistance from the state. While these cases reiterate that the role of parental choice is a relevant factor in determining the effect of a particular program or policy, they do not reject the general principle of *Nyquist* that the role of parents in the process is merely one factor to consider. *Nyquist,* 413 U.S. at 781. Moreover, *Mueller, Witters,* and *Zobrest* do not overrule the general principle in *Nyquist* and *Agostini* that the State may not grant aid to a religious school, whether cash or in kind, whether provided to parents or students, where the effect of the aid is to subsidize the religious mission of the school or finance religious indoctrination.

In the present case, there can be no doubt that a tuition payment from the Chittenden Town School District to Mount Saint Joseph Academy would have the effect of a direct subsidy to the religious school. This primary effect does not change merely because the funds only go to Mount Saint Joseph Academy if Chittenden parents choose to send their children there. In so holding, the court does not intend to suggest that this case differs from *Mueller, Witters,* and *Zobrest* merely because of the difference in the amount of money that the sectarian

school would receive, as the amount of money received by the sectarian school is not the determinative factor. *See Agostini*, 1997 WL 338583, at *12. The case at bar differs from those cited by the plaintiffs in that, here, the Chittenden Town School District seeks to implement a policy whereby Mount Saint Joseph Academy, and other religious schools, on a continuing basis, can look to public monies to fund their general operating budget. The public money would not serve simply the peripheral needs of the school or primarily benefit special needs children, but instead, would be a source of funding for all of the school's operating expenses. Although the United States Supreme Court in recent cases, and Vermont Supreme Court in *Campbell* suggest that there is an increasing number of exceptions to the general rule that public funds may not be used to aid a pervasively sectarian school, the exceptions have not yet swallowed the rule, and in the end, are unlikely to do so. Accordingly, we conclude that tuition payments made by the Chittenden Town School District to Mount Saint Joseph Academy would constitute an impermissible direct subsidization of the sectarian nature of the school and would therefore, have the impermissible primary effect of advancing religion.

III.

Given our decision that the tuitioning program at issue in this case violates the second prong of *Lemon*, we perhaps need not consider whether the Chittenden Town School District's payment of tuition to Mount Saint Joseph fosters excessive entanglement between religion and state. In light of the extensive impact that the tuitioning

policy would have, we will discuss the entanglement issue.

The third prong of the *Lemon* test determines whether the proposed action results in the excessive entanglement between state and religion by examining the character and purposes of the institutions that are benefitted, the nature of the aid provided by the state, and the resulting relationship between the government and the religious activity. *Lemon*, 403 U.S. at 615. Not all entanglements between church and state are impermissible under the Establishment Clause, as interaction between church and state is inevitable and some entanglement must be tolerated. *Agostini*, 1997 WL 338583, at *14. Entanglement only violates the Establishment Clause when it is excessive in that it either advances or inhibits religion. *Agostini*, 1997 WL 338583, at *14.

There are several factors which a court should consider to determine whether a policy creates excessive entanglement between church and state. First, the court should consider whether the program requires "pervasive monitoring by public authorities" to ensure that public funds are not being used to inculcate religion. *Id.* Additionally, the court must decide whether the program entangles the state in the details of administering a religious activity, *id.*; *Lemon*, 403 U.S. at 615, or carries the potential for continuing political strife over aid to religion. *Agostini*, 1997 WL 338583, at *14; *Nyquist*, 413 U.S. at 794. Although the last two considerations are relevant to the issue of entanglement, their presence, "by themselves," is insufficient to create "excessive" entanglement. *Agostini*, 1997 WL 338583, at *14.

A.

In the original 1985 *Aguilar v. Felton* decision, now overruled, the Court fond that the educational program at issue required "pervasive monitoring by public authorities" to ensure that the public school instructors were not, intentionally or inadvertently, inculcating religion. *Agostini*, 1997 WL 338583, at *14 (citing *Aguilar*, 473 U.S. at 413-14). The Court found that such "pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Agostini*, 1997 WL 338583, at *9 (quoting *Aguilar*, 473 U.S. at 413).

When the Court reevaluated its decision in *Agostini*, the Court abandoned the assumption underlying *Aguilar*, that public employees on parochial school grounds would be tempted to inculcate religion, despite the standards they are required to uphold. *Agostini*, 1997 WL 338583, at *14. Because the Court abandoned that assumption, it also abandoned the assumption that pervasive monitoring is required to "detect inculcation of religion by public employees." *Id.*

The assumption that monitoring is required cannot be abandoned in the case at bar. Use of the public money is not restricted to funding remedial courses offered in the high school. Here, the government funds could be used for any purpose that the Sisters of Saint Joseph deem appropriate. The money could be used to pay employees of the religious institution, who are bound to adhere to Catholic doctrine in their teachings and to attend activities organized by the theology department,

or the money could be used to fund the theology department itself, repair the chapel, or purchase religious materials. Thus, unlike *Agostini*, public authorities in the present case would have to assume that the teachers and administrators of Mount Saint Joseph Academy not only involve themselves in teaching religious beliefs, but would use public funds to assist in that process. If we assume that the use of public funds to advance the sectarian mission of Mount Saint Joseph Academy could be minimized through public oversight, the level of supervision would be pervasive and continuous. Not only would public authorities have to review the budget of the school, but would have to survey classes and extracurricular activities to ensure that public funds were not used for religious purposes. Such monitoring by public authorities could not be avoided in the present case.[12]

B.

In addition to requiring pervasive monitoring of Mount Saint Joseph Academy, implementation of Chittenden's proposed policy would create excessive administrative entanglement between church and state. We

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[12] In truth, we cannot conceive how even the most pervasive monitoring of Mount Saint Joseph Academy by public authorities could prevent the institution from using public funds to advance the sectarian mission of the school. The tuition payments made by the Chittenden Town School District would be included in the operating budget of the school for its general use. Unlike the program in *Agostini*, where the Court could draw a line between funding the educational function and finding the sectarian goal of the school, we cannot draw such a line in the present case.

believe the plaintiffs' argument, that the school boards of the tuitioning towns will play no role in the administration of any sectarian school that its students attend, ignores the widespread ramifications of allowing tuitioning school districts, like Chittenden, to make tuition payments to sectarian schools.

According to the parties' stipulation of facts, in the 1995-96 school year, there were eighty-five school districts, like Chittenden, that tuitioned secondary school students to the schools of their choice. The total number of tuitioned students from these school districts was 6,336. If Chittenden is allowed to make tuition payments to sectarian schools, then the other eighty-four school districts would be allowed to do the same. The plaintiffs do not dispute this fact. Consequently, tuition payments from public funds would routinely be going into the coffers of not only Mount Saint Joseph Academy, but also to other pervasively sectarian schools across the state, including Baptist schools, Seventh Day Adventists schools, and Christian schools. As the United States Supreme Court recognized in *Lemon* direct cash payments to a religious school are often followed by "sustained and detailed" administrative oversight to ensure compliance with statutory and constitutional standards. *Lemon*, 403 U.S. at 621.

Recently, the Vermont Supreme Court held that, under the Vermont Constitution, the state is constitutionally obligated to provide every school-age child in Vermont an equal educational opportunity. *Brigham v. State of Vermont*, 8 Vt.L.W. 41, 48, 692 A.2d 384 (1997). Although the ramifications of the *Brighman* decision are far from clear, it does suggest, at a minimum, that where

a school district satisfies its obligation to provide secondary education to children by tuitioning its students to other schools, those other schools, including religious schools, must provide the students with an equal opportunity to learn. If this interpretation is correct, the school district will not be able to show that the schools to which it sends its students meet this constitutional requirement, absent some "oversight and surveillance" over the schools, including the religious schools like Mount Saint Joseph Academy.

Even without the *Brigham* decision, administrative entanglement between religion and the state would be inevitable in Chittenden. Each year, when the school budget debate begins in Chittenden, taxpayers are almost certain to inquire as to where their tax dollars are being spent and for what purpose. In order to answer their questions, the school board will have to engage in some level of continuing administrative review of the religious schools' budget and activities. This inevitable result was noted by the United States Supreme Court in *Lemon* in its statement that "[t]he history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." *Lemon*, 403 U.S. at 621.

C.

Even if such administrative entanglement could and would be minimized, allowing school boards, like Chittenden, to tuition students to sectarian schools "carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion." *Nyquist*,

413 U.S. at 794. The plaintiffs argue that the issue of political divisiveness is irrelevant to the present case because it does not involve "direct subsidies" to parochial schools. *See Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 455 n.10 (1994) (issue of political divisiveness not relevant in "indirect" aid cases). For the reasons stated earlier, we conclude that the facts of this case do involve "direct subsidization" of parochial schools, and therefore we find issue of political divisiveness highly relevant.

Based on the facts in the present case, the only plausible conclusion we can reach is that even if allowing Chittenden to tuition its students to Mount Saint Joseph Academy does not have the immediate effect of creating political divisiveness and entanglement, such entanglement will rapidly develop. Shortly after Chittenden begins making tuition payments to Mount Saint Joseph Academy, parents to Grand Isle will request that their school board tuition their children to Rice Memorial High School in Burlington. Thereafter, more and more parents in tuitioning school districts throughout the state would ask their school boards to tuition their children to pervasively sectarian schools. Inevitably, pervasively sectarian schools would begin to look to public funds as a potential source of funding for their institutions. New sectarian schools of all kinds, perhaps on the fringes of the religious main stream, seeing the potential for public financial support, would open their doors. Then, schools like Mount Saint Joseph Academy, whose tuition is significantly less than the cost of educating a child, could increase their tuition to better cover the cost of education and other institutional expenses. Pervasively sectarian

schools would have an incentive to increase their revenues by recruiting students from tuitioning school districts to attend their institutions. As a result, an increasing number of pervasively sectarian schools will be competing for an increasing amount of public funds on a continuing basis. The Supreme Court has recognized that "aid programs of any kind tend to become entrenched to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases." *Nyquist,* 413 U.S. at 797.

Additionally, as tuitioning towns begin to send tuition payments to pervasively sectarian schools, debates over the school budget will intensify and divide along religious lines. "The potential for political divisiveness . . . is aggravated . . . by the need for continuing annual appropriations." *Lemon,* 403 U.S. at 623. It is this type of political strife which the Establishment Clause seeks to avoid. Justice Holden of the Vermont Supreme Court put it eloquently:

> The Bill of Rights secures to those of the Catholic faith that the State shall not intrude in the affairs of their Church or its institutions. It assures to those of different persuasion that it will not lend assistance to them or those of differing faith in the pursuit of their religious beliefs. Our government is so constituted to the end that the schisms of the churches shall not be visited upon the political establishment. Neither shall the conflicts of the political establishment attend the churches.
>
> Considerations of equity and fairness have exerted a strong appeal to temper the severity of this

> mandate. The price it demands frequently imposes heavy burdens on . . . faithful parent[s]. [They share] the expense of maintaining the public school system, yet in loyalty to [their] child and [their] belief [seek] religious training for the child elsewhere. But the same fundamental law which protects the liberty of [parents] to reject the public system in the interests of [their] child's spiritual welfare, enjoins the state from participating in the religious education [they have] selected.

Swart v. South Burlington Town School District, 122 Vt. 177, 188 (1961).

The United States Supreme Court has indicated that it does not perceive the danger of religiously dominated political process, which was present at the time of the Bill of Rights and feared by the Framers, to be as significant a risk today. *Mueller*, 463 U.S. at 400. In making this statement, however, the Supreme Court did not say that the danger has been eliminated, but instead, that the policies behind the Establishment Clause must be kept in perspective when confronted with "attenuated financial benefits," like the tax deductions that were at issue in *Mueller*.

In the present case, however, the issue is not "an attenuated financial benefit," but is direct and unrestricted tuition payments. While the concerns underlying the Establishment Clause must be kept in perspective, they must not be forgotten. The political strife and divisiveness that would result from allowing Chittenden and other similar school districts to tuition students to pervasively sectarian schools in precisely the type of division contemplated by the Establishment Clause. *See Grand Rapids*, 473 U.S. at 382, *overruled in party by*

Agostini, 1997 WL 338583, at *15 ("just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religious or sects that have from time to time achieved dominance"). Not only will various religious organizations be competing for public funds, but every school budget debate will include arguments about how much money the various religious schools should receive, with other taxpayers arguing that religious schools should receive no funds.

D.

In sum, we conclude that the direct and unrestricted payment of tuition monies by the Chittenden Town School District to Mount Saint Joseph Academy will require pervasive public supervision over the operation of the institution, and foster excessive administrative entanglement between religion and the state and continuing political strife over aid to religion. The fact that such direct aid programs create such an entanglement has never been doubted. *See Nyquist*, 413 U.S. at 797; *Lemon*, 403 U.S. at 623. Certainly, in other cases, where the attenuated aid indirectly benefits a sectarian school through a program intended to assist individuals with special needs or a tax deduction for parents, the entanglement issues are essentially eliminated. *See Mueller*, 463 U.S. at 400. In the present case, however, the potential for entanglement is evident, and if entanglement does not exist the day the Chittenden Town School District is allowed to tuition students to Mount Saint Joseph Academy, it shortly will develop. Of this, we have no doubt.

Nothing in this opinion should be taken to denigrate the goal and intent of religious schools in Vermont. As Justice Brennan articulated in *Grand Rapids*,

> "[the contribution of church-related elementary and secondary schools] has been and is enormous." But the Establishment Clause "rests on the belief that a union of government and religion tends to destroy government and to degrade religion." Therefore, "the Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." Because "the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined," the position of those lines has by now become quite clear. . . .

Grand Rapids, 473 U.S. at 398, *overruled in part by Agostini*, 1997 WL 338583, at *15 (citations omitted).

The Chittenden Town School District's proposed policy of tuitioning secondary students to Mount Saint Joseph Academy clearly falls outside that line. The level of entanglement is simply too great. Accordingly, we concluded that the Establishment Clause and Article 3 of the Vermont Constitution prohibit the plaintiffs from making tuition payments to Mount Saint Joseph Academy, because such payments would have the primary effect of advancing religion and would promote excessive entanglement between religion and the state.

VERMONT CASE LAW:

The Vermont Supreme Court has already considered and decided the precise issue that is raised by this case: whether a tuitioning town may, consistent with the First Amendment, use public funds to pay tuition for its students to attend sectarian high schools. *See Swart v. South Burlington Town School District,* 122 Vt. 177, *cert. den.* 366 U.S. 925 (1961). Applying the First Amendment jurisprudence of the time, the *Swart* Court answered the question in the negative, holding that it was unconstitutional for the South Burlington Town School District to have paid tuition for its students to attend sectarian schools operating by the Roman Catholic Diocese of Burlington. *Swart* at 184, 188. "The same fundamental law which protects the liberty of a parent to reject the public system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he [or she] has selected." *Swart,* 122 Vt. at 188.

In this case, we have revisited the precise issue presented in *Swart* and found that *Swart*'s holding remains consistent with current First Amendment jurisprudence. We recognize that this conclusion is at odds with the Vermont Supreme Court's recent decision in *Campbell v. Manchester Board of School Directors,* 161 Vt. 441 (1994). In *Campbell,* a parent appealed from the State Board of Education's denial of his request for reimbursement of the tuition he had paid to an out-of-state parochial high school. As in *Swart,* the parent resided in a district that did not maintain a public high school, and which was required by state law to pay high school tuition on behalf of high school students residing in the town. The Court concluded that the Establishment Clause did not prohibit

the town from reimbursing a parent for tuition paid to an out-of-state pervasively sectarian school. *Campbell,* 161 Vt. at 456. In so doing, the Court found that reimbursing the plaintiff for this tuition payment only provides an indirect and incidental benefit to a sectarian school and does not create excessive entanglement. *Id.*

We question the Court's reasoning in *Campbell.* On its facts, *Campbell* seems a departure from the core principles of the Establishment Clause. In no other case presented to the Court has it been found that the Establishment Clause permits a town to make tuition payments to a pervasively sectarian school, even if the money only goes there as a result of the parents' choice to send their child there. Contrary to the Vermont Supreme Court's analysis in *Campbell,* the provision of such aid to sectarian schools does not become "indirect and incidental" as a result of the role of parental choice, but remains a direct and substantial benefit to a sectarian school which has the primary effect of advancing religion.

Moreover, it is irrelevant that the parent in *Campbell* sought reimbursement for tuition rather than direct tuition payments to a sectarian school. The effect is the same. "Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same . . . whether [a parent] gets [the money] during the current year, or as reimbursement for the past year, is of no constitutional importance." *Nyquist,* 413 U.S. at 786-787. Any distinction between the two is a distinction without a difference. Likewise, we see no difference where the sectarian school is located in another state. At best, it only lessens possible administrative entanglement

through oversight by the Vermont Department of Education.

The only means to resolve the analytical differences between *Campbell* and other Establishment Clause jurisprudence is to restrict the applicability of *Campbell* to the facts presented therein. In fact, the Vermont Supreme Court emphasized:

> the narrowness of our decision based on the narrowness of the record before us . . . we decide only that giving tuition reimbursement to this plaintiff will not offend the Establishment Clause. . . . In other cases, with a fuller record or different circumstances, the result may well be different.

Campbell, 161 Vt. at 456. We find that, although the circumstances presented in this case are substantially similar to the facts in *Campbell*, application of current First Amendment jurisprudence to the extensive record in this case compels a different result. The Establishment Clause and Chapter I, Article 3 prohibit the Chittenden Town School District from making tuition payments to a pervasively sectarian high school, as such payments would have the primary effect of advancing religion and creating excessive entanglement between the state and religion.

ORDER:

We hold that tuition payments from a school district to pervasively sectarian high schools, or the parents of the children who attend, would have the effect of a direct subsidy to religious schools in violation of the United

States and Vermont Constitutions. The present injunctions agreed to by stipulation shall remain in effect during any appeal from this decision. If the appellate court should see the case differently, finding for the plaintiffs, we will then order the State to reimburse the plaintiffs for the costs of tuition already paid to Mount Saint Joseph Academy.

We grant the defendants' motion for summary judgment. The plaintiffs' motion for summary judgment is respectfully denied.

Dated at Rutland, County of Rutland and State of Vermont, this 27th day of June, 1997.

/s/ Alden T. Bryan
Alden T. Bryan
Presiding Judge

16 VSA § 166. Approved and recognized independent schools.

(a) An independent school may operate and provide elementary education or secondary education if it is either approved or recognized as set forth herein.

(b) Approved independent schools. On application, the state board shall approve an independent school which offers elementary or secondary education if it finds, after opportunity for hearing, that the school provides a minimum course of study and that it substantially complies with the board's rules for approved independent schools. Except as provided in subdivision (6) of this section, the board's rules must at minimum require that the school has the resources required to meet its stated objectives, including financial capacity, faculty who are qualified by training and experience in the areas in which they are assigned, and physical facilities and special services that are in accordance with any state or federal law or regulation. Approval may be granted without state board evaluation in the case of any school accredited by a private, state or regional agency recognized by the state board for accrediting purposes.

(1) On application, the state board shall approve an independent school which offers kindergarten but no other graded education if it finds, after opportunity for hearing, that the school substantially complies with the board's rules for approved independent kindergartens. The state board may delegate to another state agency the authority to evaluate the safety and adequacy of the buildings in which kindergartens are conducted, but shall

consider all findings and recommendations of any such agency in making its approval decision.

(2) Approvals under this section shall be for a term established by rule of the board but not greater than five years.

(3) An approved independent school shall provide to the parent or guardian responsible for each of its pupils, prior to accepting any money for that pupil, an accurate statement in writing of its status under this section, and a copy of this section. Failure to comply with this provision may create a permissible inference of false advertising in violation of 13 V.S.A. § 2005.

(4) Each approved independent school shall provide to the commissioner on October 1 of each year the names and addresses of its enrolled pupils. Within seven days of the termination of a pupil's enrollment, the approved independent school shall notify the commissioner of the name and address of the pupil. The commissioner shall forthwith notify the appropriate school officials as provided in section 1126 of this title.

(5) The state board may revoke or suspend the approval of an approved independent school, after opportunity for hearing, for substantial failure to comply with the minimum course of study, for failure to comply with the board's rules for approved independent schools, or for failure to report under subdivision (b)(4) of this section. Upon revocation or suspension, students required to attend school who are enrolled in that school shall become truant unless they enroll in an approved public school, approved or recognized independent school or approved home instruction program.

(6) This subdivision applies to an independent school located in Vermont which offers a program of elementary or secondary education through correspondence, electronic mail, satellite communication or other means and which, because of its structure, does not meet some or all the rules of the state board for approved independent schools. In order to be approved under this subdivision, a school shall meet the standards adopted by rule of the state board for approved independent schools which can be applied to the applicant school and any other standards or rules adopted by the state board regarding these types of schools. A school approved under this subdivision shall not be eligible to receive tuition payments from public school districts under chapter 21 of this title. However, a school district may enter into a contract or contracts with a school approved under this subdivision for provisions of some education services for its students.

(c) Recognized independent schools. Upon filing an enrollment notice a recognized independent school may provide elementary or secondary education in Vermont. The enrollment notice shall be on a form provided by the commissioner and shall be filed with the commissioner no earlier than three months before the beginning of the school year for the public schools in the town in which the applicant proposes to locate.

(1) The enrollment notice shall contain the following information and assurances:

(A) a statement that the school will be in session an amount of time substantially equivalent to that required for public schools;

(B) a detailed description or outline of the minimum course of study for each grade level the school offers, and how the annual assessment of each pupil will be performed; and

(C) assurances that:

(i) the school will prepare and maintain attendance records for each pupil enrolled or regularly attending classes;

(ii) at least once each year the school will assess each pupil's progress, and will maintain records of that assessment, and present the result of that assessment to each student's parent or guardian;

(iii) the school's educational program will include the minimum course of study set forth in section 906 of this title; and

(iv) the school will have teachers and materials sufficient to carry out the school's educational program; and

(v) the school will meet such state and federal laws and regulations concerning its physical facilities and health and safety matters as are applicable to recognized independent schools.

(2) If the commissioner has information that creates significant doubt about whether the school would be able to meet the requirements set forth above, the commissioner may call a hearing. At the hearing, the school shall establish that it can meet the requirements for recognized independent schools. Failure to do so shall result in a finding by the commissioner that the school must take specified action to come into compliance within a specified time frame or the children enrolled must attend

another recognized independent school, approved independent or public school, or home study program, or be declared truant unless absent with legal excuse.

(3) A recognized independent school shall provide to each student's parent or guardian a copy of its currently filed statement of objectives and a copy of this section. The copy shall be provided when the pupil enrolls or before September 1, whichever comes later. Failure to comply with this subsection may create a permissible inference of false advertising in violation of section 2005 of Title 13.

(4) A recognized independent school shall renew its enrollment notice annually. An independent school shall be recognized for a period not to exceed five years by the commissioner without need for filing an annual enrollment notice if:

(A) it is recognized by an organization approved by the state board for the purpose of recognizing such school, or

(B) it is accredited by a private, state or regional agency approved by the state board for accrediting purposes. Nothing contained herein shall be construed to prohibit the commissioner from initiating a hearing under this section.

(5) If the commissioner has information that creates significant doubt about whether the school, once in operation, is meeting the requirements for recognized independent schools, the commissioner may call a hearing. At the hearing, the school shall establish that it has met the requirements for recognized independent

schools. Failure to do so shall result in a finding by the commissioner that:

(A) the school may not be in operation for the remainder of the school year and that the children are truant unless absent with legal excuse or enrolled in an approved public or independent school, another recognized independent school or a home study program; or

(B) the school must take specified action to come into compliance within a specified time frame or the school will not be permitted to operate for the remainder of the school year.

(6) Each recognized independent school shall provide to the commissioner on October 1 of each year the names and addresses of its enrolled pupils. Within seven days of the termination of a pupil's enrollment, the recognized independent school shall notify the commissioner of the name and address of the pupil. The commissioner shall forthwith notify the appropriate school officials designated in section 1126 of this title.

(7) After the filing of the enrollment notice or at a hearing, if the school is unable to comply with any specific requirements due to deep religious conviction shared by an organized group, the commissioner may waive such requirements if he or she determines that the educational purposes of this subsection are being or will be substantially met.

(d) Council of independent schools. A council of independent schools is created consisting of eleven members, no fewer than three of whom shall be representatives of recognized independent schools. The commissioner shall

appoint nine members from within the independent schools' community. The commissioner shall appoint two members from the public-at-large. Each member shall serve for two years and may be reappointed for up to an additional two terms, except that five of the first eleven appointments shall be for an initial term of one year. The council shall hold its organizational meeting before March 1, 1990 at the call of the commissioner and shall adopt rules for its own operation. A chair shall be elected by and from among the members. The duties of the council shall include advising the commissioner on policies and procedures with respect to independent schools. No hearing shall be initiated before the state board or by the commissioner under this section until the recommendations of the council have been sought and received. The recommendations of the advisory council, including any minority reports, shall be admissible at the hearing.

(e) The board of trustees of an independent school operating in Vermont shall adopt harassment policies, establish procedures for dealing with harassment of students and provide notice of these as provided in section 565 of this title for public schools, except that the board shall follow its own procedures for adopting policy.

(f) An approved independent school which accepts students for whom the district of residence pays tuition under chapter 21 of this title shall bill the sending district monthly for a state-placed student and shall not bill the sending district for any month in which the state-placed student was not enrolled.

(g) An approved independent school which accepts students for whom the district of residence pays tuition

under chapter 21 of this title shall use the assessment or assessments required under subdivision 164(9) of this title to measure attainment of standards for student performance of those pupils. In addition the school shall provide data related to the assessment or assessments as required by the commissioner.

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16 V.S.A. § 822. School districts to maintain high schools or pay tuition.

(a) Each school district shall provide, furnish, and maintain one or more approved high schools in which high school education is provided for its pupils unless:

(1) The electorate authorizes the school board to close an existing high school and to provide for the high school education of its pupils by paying tuition in accordance with law. Tuition for its pupils shall be paid to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state; or

(2) The school district is organized to provide only elementary education for its pupils.

(b) For purposes of this section, a school district which provides, furnishes and maintains a program of education for the first eight years of compulsory school attendance shall be obligated to pay tuition for its pupils for at least four additional years.

(c) The school board may both maintain a high school and furnish high school education by paying tuition to a public school as in the judgment of the board may best serve the interests of the pupils, or to an approved independent school if the board judges that a pupil has unique educational needs that cannot be served within the district or at a nearby public school. Its judgment shall be final in regard to the institution the pupils may attend at public costs.

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§ 823. Elementary tuition.

Statute text

Tuition for elementary pupils shall be paid by the district in which the pupil is a resident. The tuition paid to a public elementary school shall be at a rate not greater than the calculated net cost per elementary pupil in average daily membership in the receiving school district for the year of attendance. The tuition paid to an approved independent elementary school shall not exceed the lesser of (1) the average announced tuition of Vermont union elementary schools for the year of attendance or (2) tuition charged by the public elementary school attended by the greatest number of the district's pupils.

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§ 824. High school tuition.

Statute text

(a) Tuition for high school pupils shall be paid by the school district in which the pupil is a resident.

(b) Except as otherwise provided for technical students, the district shall pay the full tuition charged its pupils attending an approved public high school in Vermont or an adjoining state, or a public or independent school in Vermont functioning as an approved area technical center, or an independent school meeting public school standards. However, if a payment made to an approved public high school or an independent school meeting public school standards is three percent more or less than the calculated net cost per secondary pupil in average daily membership in the receiving school district for the year of attendance then the district shall be reimbursed, credited or refunded pursuant to section 836 of this title, unless otherwise agreed to by the boards of both the receiving and sending districts or independent schools.

(c) For students in grades 7 and 8, the district shall pay an amount not to exceed the average announced tuition of Vermont union high schools for students in grades 7 and 8 for the year of attendance for its pupils enrolled in an approved independent school not functioning as a Vermont area technical center, or any higher amount approved by the electorate at an annual or special meeting warned for that purpose. For students in grades 9-12, the district shall pay an amount not to exceed the average announced tuition of Vermont union high schools for students in grades 9-12 for the year of attendance for its pupils enrolled in an approved independent school not

functioning as a Vermont area technical center, or any higher amount approved by the electorate at an annual or special meeting warned for that purpose.

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§ 825. Maximum tuition rate, calculated net cost per pupil defined.

Statute text

(a) Calculated net cost per pupil for purposes of this chapter shall be defined by the commissioner. Expenditures shall include those for equipment and school building construction, additions or renovations. Expenditures excluded shall be:

(1) Transportation costs incurred by the receiving school district for its resident pupils;

(2) Transportation costs for which the receiving school district receives reimbursement;

(3) That portion of the total cost which is provided by direct grants from state or federal sources for salaries or other specific expenses;

(4) Expenditures for maintenance, and payments of principal and interest for buildings used exclusively for boarding students if any;

(5) Expenditures for special education.

(b) In no case shall the tuition charged be such that the ratio of the total tuition received to the total cost of

operation of the receiving school, or school district, exceeds the ratio of the number of tuition paying pupils to the total number of pupils enrolled in the receiving school, or school district.

(c) The commissioner shall investigate complaints by a school board regarding tuition and may, within the limits of funds appropriated for this specific purpose, contract for limited scope audits of the annual statistical reports submitted by school districts for the purpose of determining the accuracy of the allocation of revenues and expenditures to elementary and secondary tuition rates.

---

§ 826. Notice of tuition rates; special education charges.

Statute text

(a) A school board, or the board of trustees of an independent school meeting public school standards which proposes to increase tuition charges shall notify the school board of the school district from which its nonresident pupils come, and the commissioner, of the proposed increase on or before February 1 in any year; such increases shall not become effective without the notice and not until the following school year.

(b) A school board or the board of trustees of an independent school meeting public school standards may establish a separate tuition for one or more special education programs. No such tuition shall be established unless

the state board has by rule defined the program as of a type which may be funded by a separate tuition. Any such tuition shall be announced in accordance with the provisions of subsection (a) of this section. The amount of tuition shall reflect the net cost per pupil in the program. The announcement of tuition shall describe the special education services included or excluded from coverage. Tuition for part-time pupils shall be reduced proportionally.

(c) Excess special education costs incurred by a district in providing special education services beyond those covered by tuition may be charged to the pupil's district of residence. However, only actual costs or actual proportionate costs attributable to the student may be charged.

(d) The state board shall adopt rules relating to the types of special education programs which may establish tuition charges and relating to methods and times of calculating excess charges.

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§ 827. Designation of an independent high school as the public high school of a school district.

Statute text

(a) A school district not maintaining an approved public high school may vote on such terms or conditions as it deems appropriate, to designate an approved independent school as the public high school of the district.

(b) When the board of trustees of such school votes to accept this designation the school shall be regarded as a public school for tuition purposes and the school district shall pay tuition to the school only, until such time as the school district or the board of trustees of the school votes to rescind the designation.

(c) A parent or guardian who is dissatisfied with the instruction provided at the school or who cannot obtain for his child the kind of course or instruction desired there, or whose child can be better accommodated in an approved high school nearer his home, may request the school board to pay tuition to another approved high school.

(d) The school board may pay tuition to another approved high school as requested if in its judgment that will best serve the interests of the pupil. Its decision shall be final in regard to the institution the pupil may attend.

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§ 828. Tuition to approved schools, age, appeal.

Statute text

A school district shall not pay the tuition of a pupil except to a public or independent school or tutorial program approved by the state board, nor shall payment of tuition on behalf of a person be denied on account of age. Unless otherwise provided, a person who is aggrieved by a decision of a school board relating to eligibility for tuition payments, the amount of tuition payable, or the

school he or she may attend, may appeal to the state board and its decision shall be final.

MOTION FILED

NOV 5 1999

No. 99-628

(2)

In The

Supreme Court of the United States

CYNTHIA AND DOUGLAS ANDREWS; CHAD M. ANDREWS by Cynthia and Douglas Andrews; CHRISTINE FALK; MICHAEL AND ROBIN FALK by Christine Falk; CHARLENE AND ROBERT KIRN; JENNIFER KIRN by Charlene and Robert Kirn; SHERRIE D. LaFEMINA; SHERRIE E. LaFEMINA by Sherrie D. LaFemina; JEFFREY AND KATHLEEN PRATT; JUSTIN AND JENNIFER PRATT by Jeffrey and Kathleen Pratt; NANCY POLJACIK; JASON POLJACIK by Nancy Poljacik; DIANE LUCIA; TIFFANY AND FRANK LUCIA by Diane Lucia; WILLIAM TRACY; AND TYLER TRACY by William Tracy,

Petitioners,

v.

CHITTENDEN TOWN SCHOOL DISTRICT; VERMONT DEPARTMENT OF EDUCATION; ELIZABETH SOJOURNER; FRANCES LOVE; HARRIET THORNE; REV. DONALD BENEDICT; RICHARD CLARK; HUGH SHORT; and JOHN VITA,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *amici curiae* Christian Legal Society, the Union of Orthodox Jewish Congregations of America, and National Association of Evangelicals move for leave to file the accompanying brief *amici curiae*.

All petitioners and respondents who are represented by legal counsel have consented to the filing of this brief *amici curiae*. The consent letters have been filed with the Clerk of this Court. One party, Chittenden Town School District, however, has not retained legal counsel to represent it in this Court. The two persons upon whom petitioners served the petition for a writ of *certiorari* refused to consent to the filing of this brief *amici curiae*. It is not clear whether these persons have the authority to deny or grant consent on behalf of the Chittenden Town School District, but neither is it clear which person or persons do have such authority. Due to this unusual set of circumstances, it seems necessary to file this Motion for Leave to File Brief *Amici Curiae*.

Amici curiae have filed numerous briefs *amici curiae* in religious liberty cases before this Court over the past two decades. *Amici curiae* have special expertise regarding the issues raised in the petition for a writ of *certiorari*. Specifically, Christian Legal Society has filed briefs *amici curiae* in this Court, urging the unconstitutionality of viewpoint discrimination against religious ideas, persons and expression – precisely the discrimination required by the decision below – in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), and *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993). Christian Legal Society

also filed a brief *amici curiae* in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), in which this Court interpreted the Free Exercise Clause to prohibit discriminatory treatment of religious persons. Christian Legal Society filed a brief *amici curiae* this Term in *Mitchell v. Helms*, No. 98-1648, specifically on the issue of the government's ability to determine which religious institutions are pervasively sectarian and which are not – an issue highly relevant to implementation of the decision below.

Because of *amici curiae's* long involvement in issues of religious liberty, particularly protection of religious persons from discriminatory treatment and protection of religious expression from viewpoint discrimination, *amici curiae* are able to provide the Court with a unique perspective on the vital importance of the First Amendment issues raised in the petition for a writ of *certiorari*. *Amici curiae* respectfully request that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The specific interest of each *amici curiae* is set forth in the appendix. *Amici curiae* have worked to protect religious liberty for over two decades. *Amici* have particularly labored to protect religious persons from discriminatory treatment and to protect religious expression from viewpoint discrimination, both of which will result if the decision below is left to stand.[1]

ARGUMENT

"This is a case," as the petition for certiorari aptly puts it, "about discrimination – discrimination against 'religious people, religious ideas, [and] religious schools.' " Pet. at 9 (quoting *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (brackets in original) (O'Connor, J., concurring in part and concurring in the judgment)).[2] The petitioners, parents and children who reside in a public school district with no high school, are eligible under Vermont statutes to receive tuition benefits

[1] Counsel for a party did not author this brief in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *Amicus* Christian Legal Society received a grant from the Alliance Defense Fund to cover its expenses in producing this brief. The Alliance Defense Fund is a 501(c)(3) organization headquartered at 7819 East Greenway Road, Suite 8, Scottsdale, Arizona 85260. The Alliance Defense Fund exercised no control over the content of the brief.

[2] "Pet." references pages in the Petition for a Writ of Certiorari filed in this case, and "Pet. App." references pages in the Appendix to the Petition.

from the state for use at an accredited high school, public or private. However, state education administrators, and ultimately the Vermont Supreme Court, denied the families this generally available "tuitioning" benefit solely because the school the families chose, Mount St. Joseph – although conceded to be a "very good school" (Pet. App. at 5) – integrates religious instruction into its curriculum, and as such allowing the use of benefits there would violate the state constitution.[3]

Amici agree with the petition that by excluding schools from benefits solely on the basis that they include religious instruction in their classes, the state court's ruling unconstitutionally discriminates against religious exercise, in violation of the First Amendment's Free Exercise Clause, and against religious viewpoints in education, in violation of the Free Speech Clause. Moreover, it is no answer to say, as the state court did, that religious schools may receive aid if they separate religious instruction from their classes: that simply discriminates impermissibly among religions, and against those religions that take their faith seriously enough to integrate it throughout the school curriculum. In this brief, the *amici* expand on these arguments and why it is crucial for this Court to act to guard the core principle of the First Amendment as it applies to religion: no government discrimination against religious activities or viewpoints.

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[3] The state administrators overrode the judgment of the local public school district, which was willing to provide tuition benefits to students attending Mount St. Joseph; indeed, the administrators enforced the exclusion of that school so vigorously as to cut off all general state aid to the Chittenden Town School District. Pet. at 5.

A. The Decision Below Violates the Core Principle of the Free Exercise and Free Speech Clauses by Discriminating Against a Student in the Provision of Educational Benefits Because the Student Will Use Them in a Religious Setting.

1. The discrimination violates the core meaning of the Free Exercise Clause.

The scope of the Free Exercise Clause has recently divided members of this Court – specifically, on the question whether the clause ever protects religious activity from being burdened by a "neutral law of general applicability." *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) (quotation omitted) (holding that free exercise usually does not include protection against such neutral laws). Cf. *id.* at 894 (O'Connor, J., concurring in the judgment) (arguing that free exercise will have little "vitality" if it "cover[s] only the extreme and hypothetical situation in which a State directly targets a religious practice").

But on the question that this case presents, the Court's pronouncements are resounding and unanimous: the law may not single out religious activity for disfavored treatment. "At a minimum," the Free Exercise Clause is violated "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Bab'alu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (citing numerous authorities). Following this rule, the Court in *Lukumi* unanimously struck down a set of ordinances that, taken together, prohibited the killing of animals only in certain religious rituals. Likewise, *Employment Division v. Smith* itself stated clearly

that "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." 494 U.S. at 877. And in *McDaniel v. Paty*, 435 U.S. 618 (1978), the Court held that the Free Exercise Clause was violated by a state constitutional provision disqualifying clergy from serving in the state legislature. As Justice Brennan's separate opinion explained, the disqualification provision was unconstitutional because it "impose[d] a unique disability" on those engaging in the "protected religious activity" of the ministry. *Id.* at 632 (Brennan, J., concurring in the judgment); accord *Lukumi*, 508 U.S. at 532.

The principle that the government may not single out religious practice for disability is so well accepted that several members of the unanimous Court in *Lukumi* remarked that the case was "an easy one to decide." 508 U.S. at 580 (Blackmun, J., joined by O'Connor, J., concurring in the judgment); see also *id.* at 559 (Souter, J., concurring in part and in the judgment) ("This case turns on a principle about which there is no disagreement."). Thus, if the Free Exercise Clause means anything, it means that an individual may not be excluded from receiving a generally available government benefit solely on the ground that he or she intends to use it in a setting that involves religious activity.

The Court and individual members have often expressed the idea that laws directly targeting a religious practice for disability are rare. See, e.g., *Lukumi*, 508 U.S. at 532 (the prohibition on discrimination against religion is "not often at issue in our Free Exercise cases"); *id.* at 577-78 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) (referring to the "rare occasions on

which the government explicitly targets religion (or a particular religion) for disfavored treatment"); *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment) (referring to "the extreme and hypothetical situation in which a State directly targets a religious practice").

This case, however, exemplifies the one category in which state policies targeting religion for discriminatory, "special disabilities" are *not* rare or hypothetical. The single most frequent instance of "disfavored treatment" of religion in the court decisions of this nation is the denial of generally available benefits, particularly educational benefits, to students and their families on the ground that they would use those benefits at schools that include religious activity in their instruction. The petition for certiorari catalogs the long and growing list of decisions in which courts, legislators, or administrators have excluded students at religious schools from receiving assistance available to all other students. See Pet. at 10-18 (detailing six recent decisions including this one, although also listing several decisions rejecting such exclusion). Sometimes the exclusion is based on the (erroneous) assertion that the Establishment Clause requires it; many times, as in this case, the exclusion is based on the assertion that a state constitutional provision requires it. Under either theory, the same impermissible result follows: a discriminatory withdrawal of tuition benefits on the basis of the family's choice of an education that includes religious content.

Therefore, this case presents the single most important free exercise question under the "general applicability" standard of *Employment Division v. Smith* and *Church of Lukumi Babalu Aye*. After this Court struck down

the discriminatory ordinances at issue in *Lukumi*, observers noted approvingly that the general-applicability standard could be used in some cases to give real protection to religious exercise. See, e.g., Stephen L. Carter, *Comment: The Resurrection of Religious Freedom?*, 107 Harv. L. Rev. 118, 119 (1993) (*Lukumi* shows "the possibility of fashioning a jurisprudence of the religion clauses" that protects religious exercise); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 743, 778 (1998) (*Lukumi* "appears to have given real content to the requirements of neutrality and general applicability"). But the promise of *Lukumi* will be frustrated if the Court fails to intervene in what is by far the most common instance of anti-religious discrimination, the denial of generally available benefits to students who choose to attend religious schools.

The principle that the government must not single out religion for disabilities appears not only in this Court's free exercise cases, but also in majority and separate opinions in cases decided under the Establishment Clause. That should hardly be surprising, for the two clauses ought to work together rather than at cross-purposes. The pattern goes back to one of the first modern Religion Clause decisions, *Everson v. Board of Education*, 330 U.S. 1 (1947), where the Court upheld the inclusion of students attending religious schools in a state's program of free bus transportation. Although the precise decision rested on the Establishment Clause, the Court's reasoning clearly reflected the fact that exclusion of students attending religious schools would conflict with the free exercise value:

> The First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Id. at 18. Likewise, in more recent decisions Justice O'Connor has sought to integrate the jurisprudence of the two clauses as one of "government impartiality, not hostility, toward religion" (*Kiryas Joel*, 512 U.S. at 717-18 (concurring in part and in the judgment)):

> [T]he Religion Clauses . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or *benefits*.

Id. at 715 (emphasis added). The Court has " 'time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship.' " *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (quoting *Kiryas Joel*, 512 U.S. at 714 (O'Connor, J., concurring in part and in judgment)).

The decision in this case flies in the face of every one of these principles. To provide school tuition to families in districts without a public school, but withdraw it from a family as soon as the family chooses a school offering religious instruction rather than a public or secular private school, cannot communicate any stance but "hostility" toward religion. It makes the families' religion – their choice to attend a school where religious instruction is given – the very reason for denying them benefits, and thus treats them differently (unfavorably) precisely on

account of their mode of worship: that is, the fact that they choose to incorporate worship into the instruction of their children.

The bases on which the Vermont Supreme Court rejected the families' free exercise claim cannot withstand even minimal analysis; if generally applied, the court's reasoning would truly eviscerate the Free Exercise Clause. The court asserted that its ruling did not violate the Free Exercise Clause because it did not exclude all religious schools from tuitioning benefits, but only those that incorporate religious worship or instruction into their curriculum. Pet. App. at 51 (stating that the issue is not "that education occurs in a religious school, [but] rather . . . the content of that education"); *id.* at 53. The court did not explain why this avoided discrimination against religious activity and viewpoints – since no activity or instruction in another viewpoint in a private school would disqualify the school from the tuitioning benefits program. To single out one kind of religious activity still discriminates against religion.[4] The state court's reasoning is flatly inconsistent with, among other decisions, *McDaniel*. There the state did not disqualify all religious citizens from the legislature, but only clergy. Nevertheless, the provision still unconstitutionally discriminated against religion, as Justice Brennan pointed out: it "impose[d] a unique disability on those who exhibit a defined level of intensity of involvement in protected religious activity." 435 U.S. at 632 (Brennan, J., concurring in the judgment). Likewise, the exclusion from tuitioning

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[4] It also discriminates unconstitutionally among religious schools, as we discuss *infra* in part B.

benefits here imposes a unique disability on schools (and the families that choose them) with a sufficient "intensity of [religious] involvement" that they incorporate religious instruction or worship into their curriculum.[5]

Just as remarkably, the court held that the denial of tuitioning benefits "does not implicate the Free Exercise Clause" because the denial "requires no one 'to choose between following the precepts of [his or her] religion and forfeiting benefits' that would otherwise be available from the government." Pet. App. at 55, 54 (brackets in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). In other words, the court held that flat-out discrimination against a person based explicitly on religious choice is permissible as long as it does not involve a "precept" or "prohibit[ion]" of the person's religion. See *id.* (distinguishing *Sherbert* solely on the ground that Mrs. Sherbert's religious beliefs "prohibited her from working on Sundays"). The implications of this theory are breathtaking indeed. Under it, a state could charge church school buses twice the license fee for other private school buses, since no "precept" requires the church to use buses

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[5] The state court's observation that its ruling bars religious worship in public schools as well (Pet. App. at 53) is beside the point. The Establishment Clause, as well as other provisions, forbids the government to engage in religious speech or activity. But religious activity by private entities (the religious schools at issue in this case) is protected from government discrimination by the Free Speech and Free Exercise Clauses. *Rosenberger*, 515 U.S. at 841 (quoting *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion of O'Connor, J.) (emphasis in original)) (noting this "crucial difference 'between *government* speech endorsing religion . . . and *private* speech endorsing religion' ").

to transport students. Or a state could forbid a welfare recipient to use any part of her check to purchase religious materials, as long as the person's faith contained no precept requiring her to use or display such materials. Or a state could, contrary to *McDaniel v. Paty, supra*, exclude clergy from the benefit or privilege of serving in the state legislature, as long as (what is often the case) no specific precept required the person to become a clergyperson.

Such examples confirm that the reasoning below fundamentally misconstrues the Free Exercise Clause. Under this Court's unbroken practice, discrimination against religious activity is *per se* a "burden" on free exercise, regardless of whether the activity is important or mandatory to the faith or not. See, e.g., *Lukumi* (striking down discriminatory ordinances against animal sacrifice without asking whether Santeria members' precepts mandated that they sacrifice animals); *Smith*, 494 U.S. at 877 (stating that law that prohibited peyote use only for sacramental purposes would be unconstitutional, without referring to whether peyote use was required by faith or not). As Justice Blackmun put it in *Lukumi*, "a law that targets religious practice for disfavored treatment" automatically "burdens the free exercise of religion." 508 U.S. at 579 (Blackmun, J., joined by O'Connor, J., concurring in the judgment). The discrimination itself constitutes the burden.

The Vermont Supreme Court is not the only court to distort the Free Exercise Clause this way so as to permit the state to exclude religious citizens from educational benefits. For example, the Washington Supreme Court held, under its state constitution, that a blind student

attending a religious college must be denied state rehabilitation assistance made available to all other students. *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989). There, as here, the state court justified explicit discrimination against religion on the ground that the student was "not being asked to violate any tenet of his religious belief, nor is he being denied benefits 'because of conduct mandated by religious belief.' " *Id.* at 371, 771 P.2d at 1123 (quotation omitted). By contrast, other lower courts have correctly recognized that explicit discrimination against religion is, by itself, a burden on free exercise. See, e.g., *Hartmann v. Stone*, 68 F.3d 973, 979 & nn.3-4 (6th Cir. 1995) (holding that where law is not neutral or generally applicable, challengers need not "demonstrate a substantial burden on the practice of their religion" independent of the discrimination). The decision below in this case, therefore, should be reviewed and reversed because its basic misconstruction of the Free Exercise Clause would eviscerate the clause not only in cases concerning the discriminatory withholding of benefits, but also in other instances of discrimination against religion.

2. The discrimination violates the viewpoint-neutrality requirement at the heart of the Free Speech Clause.

For similar reasons as those above, the exclusion of schools with religious instruction and worship from the tuitioning benefits programs violates the central principle of the Free Speech Clause: that the government may not discriminate between individuals or institutions according to the viewpoint they adopt or express. Most notably,

the decision below conflicts with *Rosenberger*, 515 U.S. 819, in which the Court held that the First Amendment was violated by the exclusion of a student magazine with a religious editorial viewpoint from a program under which the University paid for the printing costs of a wide range of student publications. In holding that the University had unconstitutionally discriminated against the student publication because of its viewpoint, *Rosenberger* made clear that the government's obligation of viewpoint neutrality extends fully to the provision of generally available financial benefits such as the tutitioning benefits in this case. Other free speech decisions hold that the government may not discriminate against religious viewpoints in the provision of government benefits such as access to public property and facilities. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

The Vermont Supreme Court's decision in this case withholds tuitioning benefits from families that choose a school that incorporates religious worship and instruction into its curriculum. That is, the decision discriminates against schools that actually express religious tenets in their instruction. Indeed, the court acknowledged (in what it thought was a defense of its decision) that the disqualifying feature for a school was "the content of th[e] education" it provides (as opposed to mere religious affiliation). Pet. App. at 51. A school with a technical religious affiliation could, therefore, receive benefits as long as it does not express its religious beliefs in its classes or activities. A clearer case of discrimination on

the basis of expression of viewpoint could hardly be imagined.

3. No justification can be given for the discrimination against religion.

Amici doubt that there is any set of circumstances that authorizes the government to single out private religious activity and speech for disfavored treatment. See, e.g., *Lukumi*, 508 U.S. at 579 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) ("When a law discriminates against religion as such, . . . it automatically will fail strict scrutiny.")[6] Even assuming, however, that there are any "most unusual circumstances" that could authorize such discrimination (see p. 7 *supra*), the situation in this case – the exclusion of religious students from generally available "tuitioning" benefits – certainly presents no such exceptional circumstances.

The presence of a state constitutional provision that allegedly requires discrimination cannot overcome the commands of the federal Free Exercise and Free Speech Clauses. That point was decided in *Widmar*, 454 U.S. 263, where this Court held that a state university violated the Free Speech Clause by refusing a student religious group permission to meet in university classrooms that were open to all other student groups. There, as here, the

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[6] Again, the Establishment Clause forbids the government itself from speaking or acting religiously; public school districts in Vermont may not sponsor official religious exercises. But that principle has no application to the question in this case, which involves discrimination against religious activity in private schools that are in no sense the mouthpiece of the state.

university asserted a state constitutional interest "in achieving a greater separation of church and state than is already ensured under the Establishment Clause of the Federal Constitution." *Widmar*, 454 U.S. at 276; see also Pet. App. at 53 (concluding that while there may be "no First Amendment objection" to parents choosing to use public money at religious schools, the Vermont Constitution forbids it). The *Widmar* Court held squarely that given the limits imposed by the Free Speech and Free Exercise Clauses, an asserted interest in "strict separation" is not "sufficiently 'compelling' to justify content-based discrimination against [citizens'] religious speech." 454 U.S. at 276. See also *McDaniel*, 435 U.S. 618 (striking down state constitutional provision disqualifying clergy from legislature).

The only provision that could possibly authorize discrimination forbidden by the Free Exercise and Free Speech Clauses is the First Amendment's Establishment Clause. But the Vermont Supreme Court did not rely on the Establishment Clause (indeed, the court had earlier held in virtually identical circumstances that including religious schools in the tuitioning program was consistent with the Establishment Clause). See *Campbell v. Manchester Bd. of School Directors*, 161 Vt. 441, 644 A.2d 352 (1994). More important, the equal inclusion of religious schools clearly is consistent with the Establishment Clause under this Court's precedents. Numerous decisions hold that the clause permits the equal inclusion of religious individuals or groups in a neutral program of government benefits. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997); *Rosenberger*, 515 U.S. at 838-46; *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v.*

Washington Dept. of Services, 474 U.S. 481 (1986) (*Witters I*); *Mueller v. Allen*, 463 U.S. 388 (1983). The tuitioning program shares the same crucial feature with the programs in all of those cases: it simply permits benefits to be used in a religious setting on the same terms as in other settings, and thus under the program the government creates no incentive to choose religious education over any other form of education.

At the very least, neutrality and non-discrimination against religion is the command of the First Amendment in the vast majority of cases, and only in "the most unusual circumstances" would the Establishment Clause ever call for such discrimination. This case plainly falls into the general rule under which the Establishment Clause permits, and the Free Exercise and Free Speech Clauses require, equal treatment for religious activity and speech in the provision of government benefits. Several factors make this clear. As was the case with the rehabilitation grants to students upheld in *Witters I*, the tax deductions for families upheld in *Mueller*, and the sign-language interpreter upheld in *Zobrest*, tuitioning benefits here "ultimately flow[ ] to religious institutions only as a result of the genuinely independent and private choices of aid recipients." *Witters I*, 474 U.S. at 487; see *id.* at 493 (O'Connor, J., concurring) (because "[t]he aid to religion . . . is the result of petitioner's private choice," "[n]o reasonable observer [would think] that the state itself is endorsing a religious practice or belief"). Moreover, the tuitioning program provides the same benefits for use at public institutions – in this case, at other public school districts – as at private institutions, and religious schools by no means "threaten[ ] to dominate the forum." See

Rosenberger, 515 U.S. at 850-51 (O'Connor, J., concurring); see also *Widmar*, 454 U.S. at 263.[7]

B. The Decision Below Violates the Core of the Religion Clauses by Discriminating Among Religious Schools According to Their Degree of Religiosity.

The decision below not only discriminates against private religious speech and activity, it sets a religion-based criteria discriminating *among* religious schools. As noted above, the state court (in what it thought was a defense of its ruling) explained that the ruling did not bar the use of tuitioning benefits at all religious schools, but only at those religious schools in which religious instruction and worship are included in the curriculum. See, e.g., Pet. App. at 51 (objecting that tuitioning will, in part, "directly pay for religious instruction"); *id.* ("the issue [is not] that education occurs in a religious school, [but] rather . . . the content of that education"). In short, as the petition puts it, the decision below excludes "those schools that incorporate too much 'religious instruction' into their curriculum," and thus "create[s] discrimination *among* religious schools, based on 'how religious' they are." Pet. at 27 (emphasis in original).

Amici agree with the petition that the decision below therefore creates a "denominational preference" in violation of the fundamentals of *both* Religion Clauses. "The

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[7] See Pet. at 4-5 nn.2, 4 (noting that a large number of "tuitioned" Vermont students use the benefits at public high schools, and many private high schools in the state are non-religious).

clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Based on the same principle, the Court in *Kiryas Joel* struck down a law creating a public school district to accommodate members of one religious sect. See *Kiryas Joel*, 512 U.S. at 702-04; *id.* at 715-16 (O'Connor, J., concurring in part and in the judgment) (Religion Clauses cannot "justify discriminations based on sect"). Accord *Lukumi*, 508 U.S. at 535-36, 538-39 (striking down animal-sacrifice ordinances in part because they targeted one religious sect, the Santeria, over others). Surely it is impermissible for the government to condition the availability of educational benefits to families on a religious school's being willing to secularize to the point where religious worship and instruction are nonexistent or minimal parts of the curriculum. The Constitution emphatically forbids any preference for "low intensity" religion over "high intensity" religion. See *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment) (government may not classify based on "intensity of involvement" in religious activity).[8]

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[8] This Court has granted certiorari in *Mitchell v. Helms*, No. 98-1648, *cert. granted*, 119 S.Ct. 2336 (June 14, 1999), on the question whether the Establishment Clause permits certain forms of government aid given directly to religious schools. Because *Mitchell* involves establishment rather than free exercise and speech questions, and because it involves direct aid rather than (as in this case) benefits determined by individual choice, *amici* agree that this case poses different (although equally important) questions. However, at the very least, the petition here should be held pending the decision in *Mitchell*.

CONCLUSION

Amici submit that the conflicts between the decision below and core First Amendment principles are too severe and pervasive to pass without correction. Moreover, the discrimination against religion reflected in this case is not isolated: other courts have likewise ratified the discriminatory denial of education benefits (though still other courts have recognized such discrimination as unconstitutional), and the same issue is likely to recur in other states.

The Court's discussion of the Establishment Clause question may be affected by, and in turn speak to, the fundamental free exercise principle of nondiscrimination against religion. Moreover, the briefs in *Mitchell* discuss extensively the category of "pervasively sectarian schools" that allegedly are disqualified from receiving substantial direct government aid. See, e.g., Brief for Petitioners Guy Mitchell *et al.* at 33-46 (criticizing the category); Brief *Amici Curiae* of Christian Legal Society *et al.* (same); Brief for Respondents Mary Helms *et al.* at 33-35 (defending the category). Any discussion by this Court of the "pervasively sectarian" category is likely to be highly relevant to the Vermont Supreme Court's distinction between schools that incorporate religious worship and instruction in their curriculum and those that do not.

Amici respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center labors to preserve religious liberty in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides accurate information to the public and political branches concerning the interaction of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of many individuals, Christian and non-Christian, and on behalf of many religious organizations in virtually every case before the Supreme Court involving church/state relations. These include *Widmar v. Vincent,* 454 U.S. (1981); *Witters v. Washington Dept. of Servs. for the Blind,* 474 U.S. 481 (1986); *Bowen v. Kendrick,* 487 U.S. 589 1988); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993); *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995); and *Agostini v. Felton,* 521 U.S. 203 (1997).

This nation's Declaration of Independence "instituted a new government" by announcing that it was "laying its foundations on [immutable] principles." One of these

"self-evident truths" was that all persons are divinely endowed with rights that no government may abridge nor any citizen divest. Among such inalienable rights are those enumerated in – but not conferred by – the First Amendment, the foremost of which is religious freedom. The right to freely exercise religious conscience inheres in all persons by virtue of its endowment by the Creator. It is also a "constitutional right," but in the sense that it is recognized in rather than created by the United States Constitution. Because the source of religious liberty, as acknowledged in the Declaration, is the Creator, not a constitutional amendment, statute, or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of federal, state, or local government. This nation has no higher duty than to protect inviolate its full and free enjoyment. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . . "

The Christian Legal Society's national membership, 25 years of experience, and professional resources enable it to speak with authority upon religious liberty matters before this Court.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The Union of Orthodox Jewish Congregations of America (the "**U.O.J.C.A.**") is a non-profit synagogue umbrella organization for over 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the mainstream Orthodox Jewish community. The U.O.J.C.A. has filed briefs in federal and state courts throughout the nation in cases that affect the interests of the Jewish community and American society at large.

The U.O.J.C.A. has been particularly active and interested in cases that center upon the role of religion in our society and the interpretation and application of the Establishment and Free Exercise Clauses in that regard. It has been the consistent position of the U.O.J.C.A. that the Establishment Clause does not require government to disfavor religion in any way.

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No. 99-628

IN THE
Supreme Court of the United States

CYNTHIA ANDREWS *et vir, et al.*,
Petitioners,

v.

VERMONT DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Vermont Supreme Court

BRIEF IN OPPOSITION OF RESPONDENTS ELIZABETH SOJOURNER, *ET AL.*

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QUESTION PRESENTED

Where a State pays tuition to private schools for instructing students in secular subjects, but refuses to pay tuition for students to attend pervasively sectarian schools because the public funds would be used to finance religious instruction and other religious activities, does that refusal violate the Free Exercise rights of parents who choose to have their children attend a pervasively sectarian school but whose religion does not require such attendance?

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On Petition for Writ of Certiorari to the Vermont Supreme Court

BRIEF IN OPPOSITION OF RESPONDENTS ELIZABETH SOJOURNER, *ET AL.*

Respondents Elizabeth Sojourner, Frances Love, Harriet Thorne, Rev. Ronald Benedict, Richard Clark, Hugh Short, and John Vita ("respondents"), citizens and taxpayers of the town of Chittenden, Vermont, who intervened as defendants in this lawsuit, respectfully ask this Court to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Factual Background

Vermont requires school districts to provide their students with a high school education, but allows a district to do so either by maintaining its own high schools or by paying tuition to other approved public or independent (*i.e.*, private) high schools selected by the students' parents. *See* 16 V.S.A. §§ 822, 824. A private school can

be approved for this purpose if, *inter alia,* the Vermont Board of Education determines that the school's educational program includes a satisfactory minimum course of study and the school has sufficient resources and a qualified faculty. *See* 16 V.S.A. §§ 166(b), 906.

The Chittenden Town School District ("District"), located in Rutland County, Vermont, does not operate a high school, but instead pays tuition for its students to attend other public or independent high schools. There are six public high schools within Rutland County that are available to students from Chittenden, and those students also can choose to attend approved public or independent high schools within or outside the State of Vermont. Stipulation Regarding Facts of the Case ("Stip.") ¶¶ 11-15.

This case arose when, in May 1996, the District's School Board voted to pay tuition to Mount Saint Joseph Academy ("MSJ"), a Catholic high school in Rutland County that is attended by a number of students from Chittenden.

MSJ is a pervasively sectarian private school, "in which the secular and sectarian aspects of [the] educational program are intertwined." App. 4. The school is owned and operated by the Sisters of Saint Joseph, under the authority of the Roman Catholic Diocese of Burlington. App. 3. All students at MSJ are required to complete courses in theology, entitled Salvation History, Sacraments, Ethics and Commitment. App. 4.[1] The school day begins with

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[1] MSJ describes its theology curriculum as follows:

> During a four year period, the development of spirituality is found through liturgy, prayer, retreat and experiential learning activities. . . . Through the historical and biblical study of our faith roots, presentations, and discussions on the Gospels and lives of Christian leaders, students build a foundation for the development of their individual spiritual lives. [*Id.*]

a prayer, to which all students are required to give attention. *Id.* Teachers also are encouraged to begin each class during the day with a prayer. Stip. ¶ 78. All students, including non-Catholics, are required to attend a monthly celebration of the Roman Catholic mass led by a priest, as well as an annual spiritual retreat, which includes prayers and a mass, and a twice-yearly celebration of the Sacrament of Reconciliation. App. 4-5. All faculty are required to adhere to Catholic doctrine in their teachings. App. 5. A central objective of MSJ's educational program is to have students "witness a sense of Catholic identity—one that is rooted in an understanding of the Gospel of Jesus as proclaimed within our Catholic tradition." Stip., Exh. P, p. 1; *see* App. 4.[2]

The tuition payments authorized by the Chittenden Board were to take the form of a check drawn on the Town's public funds and sent directly to MSJ. Stip. ¶ 46. The payment would be made with "no restrictions on the type of activities or programs for which [the] funds may be used," *id.*, and "[t]he Chittenden School District has never requested or received, and does not intend to request or receive, any representations from MSJ that public moneys will not be spent on religious observance, inculcation of religious values, or on religious education," *id.* ¶ 49. The money would be placed in MSJ's general operating account, and MSJ does not separately account for sectarian and secular expenditures. *Id.* ¶ 83.

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[2] One of MSJ's two classroom buildings contains a large chapel and is crowned by a large cross. Stip. ¶ 70. That building also contains the congregational administrative offices of the Sisters of Saint Joseph, the living quarters of the President of the order, and a gift shop that sells religious objects. *Id.* The building is connected to the former convent house of the Sisters of Saint Joseph (now an assisted care living facility operated by the Sisters and used principally by them) by a structure that contains the living quarters of six of the Sisters. *Id.* ¶ 69. Crucifixes or crosses hang on the walls of most MSJ classrooms. *Id.* ¶ 70.

By making unrestricted tuition payments to MSJ, the District would "expend public money on religious education." App. 12.[3] Indeed, because the money could be used to finance MSJ's required religious services and the upkeep of its chapel, public funds would be expended not only on religious education, but on religious *worship* as well.

There is no evidence that any student attends MSJ because his or her religious beliefs require such attendance. Of the seven families whose reasons for choosing MSJ are a matter of record, five had no religious motivation at all, but focused on such considerations as the school's "discipline," "structured environment," "value-based education," "small classes" and "good educational reputation." Stip. ¶¶ 22-24, 26, 28. One parent stipulated that she chose MSJ for her daughter "because of her religious beliefs," without further elaboration, *id.* ¶ 21, while for one other parent, in addition to a variety of non-religious reasons for selecting MSJ, "MSJ's Catholic basis was also very important," *id.* ¶ 25. In no instance does the stipulated record suggest that any parent's religion *required* that a child attend a Catholic school.

B. Proceedings Below

The Vermont Department of Education ("Department") responded to the District's action by terminating all general state aid to the District, on the ground that the District's decision to pay tuition to MSJ was unconstitutional. *See* Petition for a Writ of Certiorari ("Pet.") at 5.

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[3] These payments would produce a substantial financial benefit for MSJ. The school expects that its enrollment will increase if the courts sustain the District's decision to pay tuition to MSJ, Stip. ¶ 110, and the increased tuition MSJ thereby would receive would greatly exceed any increased costs associated with the additional students, *id.* ¶ 109.

The District brought suit against the Department in state court, seeking a declaration that its decision to pay tuition to MSJ was "in compliance with the Constitution of the State of Vermont and the United States Constitution." Order of the Superior Court dated October 17, 1996, ¶ 2.[4] The Department counterclaimed, seeking a declaration that the District's decision to make tuition payments to MSJ violated the Federal and State Constitutions, and requesting an injunction. App. 6.

Petitioners Cynthia and Douglas Andrews, *et al.*—parents who are sending children to MSJ and who seek payment of the MSJ tuition by the District—were allowed to intervene. However, their request to file a complaint in intervention was disallowed, and petitioners' "participation in th[e] action [was] limited to litigation of the claims and defenses of plaintiff Chittenden School District." Order of the Superior Court dated February 26, 1997. Respondents Elizabeth Sojourner, *et al.*—residents of the Town of Chittenden who oppose the use of their state and local tax payments to fund religious education and other religious activities—also were allowed to intervene. App. 6-7.

The superior court granted the Department's motion for summary judgment, concluding that "tuition payments from a school district to pervasively sectarian high schools . . . would have the effect of a direct subsidy to religious schools in violation of the United States and Vermont Constitutions." App. 7.

The District appealed from the superior court's decision, advancing only two arguments: "that (1) tuition payment to sectarian schools does not violate either the United States Constitution or the Vermont Constitution as long

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[4] The District initially asserted other claims as well, but they were withdrawn. *Id. See also* App. 6 and n.1.

as it is based on a parent's free choice of educational provider, and (2) exclusion of sectarian schools from reimbursement violates the Free Exercise Clause of the First Amendment to the United States Constitution." App. 7-8. The District did not contend that such exclusion violates the Free Speech Clause or the Equal Protection Clause.[5] Nor did petitioners make such contentions; indeed, they could not have done so under the terms of their limited intervention.[6]

The Supreme Court of Vermont affirmed, holding that the payment by a public school district of tuition for religious instruction violates Chapter I, Art. 3 of the Vermont Constitution, which provides, *inter alia*, "that no person ought to, or of right can be compelled to . . . support any place of worship, or maintain any minister, contrary to the dictates of conscience." Thus the Court "decide[d] this case based solely on the Vermont Constitution and, since it is dispositive, [did not] need [to] consider whether the Establishment Clause of the First Amendment would also prohibit the tuition reimbursement policy at issue here." App. 15.

In deciding the state-law question presented to it, the Vermont Court emphasized that its holding was based on "the absence of adequate safeguards against the use of [public] funds for religious worship." App. 2. The Court explained:

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[5] *See* Appellants' Opening Brief [in the Vermont Supreme Court] at 1, 11, 25 (asserting that the exclusion of MSJ from the tuitioning program would violate the Free Exercise Clause, but making no assertion that the Free Speech Clause or the Equal Protection Clause would be violated); Appellant's Reply Brief at 10 (same). The District had not asserted Free Speech or Equal Protection claims in its complaint. *See supra* at 5.

[6] *See* Plaintiff-Intervenors-Appellants [sic] Appeal Brief; Reply Brief of Plaintiff-Intervenor/Appellants.

> We are not dealing here with the myriad ways that a public school district can subsidize education in a religious school by paying for expenses that occur whether or not the school was sectarian. . . . Nor is this a case where the amount of the subsidy is so small that it clearly covers only the cost of secular educational expenses. . . . Nor . . . is the issue that education occurs in a religious school, rather than the content of that education. In this case, the financing scheme can, and presumably will, directly pay for religious instruction.
>
> * * * *
>
> Thus, we conclude that the Chittenden School District tuition-payment system, with no restrictions on funding religious education, violates Chapter I, Article 3. In expressing this conclusion, we think it appropriate to state what we have not decided. The major deficiency in the tuition-payment system is that there are no restrictions that prevent the use of public money to fund religious education. . . . We express no opinion on how the State of Vermont can or should address this deficiency should it attempt to craft a complying tuition-payment scheme. We decide only that the current . . . system, with no restrictions on the purpose or use of the tuition funds, violates Article 3.

App. 50-52.

The Court then turned to the only other issue that had been presented to it: whether Vermont's refusal to fund religious education violates the Free Exercise Clause. The Court observed that the limited nature of its holding eliminated the predicate for the District's Free Exercise claim:

> The Free Exercise argument is premised on plaintiff's assumption that we would conclude that children who attend religious schools may not receive

> public educational funding, while children who attend public schools may. This is not our ruling. *We have determined only that public funds may not pay for religious worship within the meaning of Article 3, wherever it occurs.*

App. 53 (emphasis added).

Because the Court's holding was entirely consistent with the principle of "neutrality toward religion," App. 53 (quoting *Board of Educ. of Kiryas Joel Village Sch. v. Grumet*, 512 U.S. 687, 696 (1994)), and "today's ruling requires no one 'to choose between following the precepts of [his or her] religion and forfeiting benefits' that would otherwise be available from the government," App. 54 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)), the Court concluded that no colorable Free Exercise claim was presented. *Id.*

The Andrews Intervenors have petitioned for certiorari. The Chittenden Town School District has not. Rather, in March 1999, the District revised its tuition policy "to prohibit the payment of tuition to sectarian schools," on the ground that "payment of tuition to religious schools supports sectarian causes and is thus, an improper use of public funds." [7]

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[7] Letter from Chittenden Superintendent of Schools William J. Mathis to Richard Komer and Jack Facey, dated March 16, 1999 (reprinted as an appendix to this brief). Accordingly, there no longer is any dispute between the original parties to this litigation —the District and the Department. However, the case technically is not moot, as petitioners could seek reimbursement of the tuition they paid MSJ during the period that the District had authorized the payment of the tuition out of public funds.

REASONS FOR DENYING THE WRIT

The Petition does not properly set forth the sole question that actually is presented by this case. Given the facts of the case and the limited issues raised and decided below, the only question presented for possible review is whether, where a state pays tuition to private schools for instructing students in secular subjects, but refuses to pay tuition for students to attend pervasively sectarian schools because the public funds would be used to finance religious instruction and other religious activities, the state's refusal to fund such activities violates the Free Exercise rights of parents who choose to have their children attend a pervasively sectarian school, but whose religion does not require such attendance.

That idiosyncratic question does not warrant review by this Court. The question is, at most, tangential to the constitutional controversy over public assistance to sectarian private schools, and its resolution would provide no guidance as to the more fundamental Establishment Clause questions involved in that controversy. Indeed, resolving the question presented here would not even determine the constitutionality of the funding program involved in this particular case. (Point I.) Furthermore, there is no conflict among the lower courts with respect to the question presented (Point II), nor does the decision below conflict with any decision of this Court. (Point III.) Accordingly, the petition for certiorari should be denied.

I. RESOLUTION OF THE IDIOSYNCRATIC QUESTION PRESENTED BY THIS CASE WOULD PROVIDE NO GUIDANCE ON THE FUNDAMENTAL QUESTIONS RAISED BY PROGRAMS THAT PROVIDE PUBLIC ASSISTANCE TO SECTARIAN PRIVATE SCHOOLS

Petitioners acknowledge—indeed, they are at pains to demonstrate—that cases involving public assistance to pri-

vate sectarian schools, including tuition voucher programs, tuition tax credit programs, and other "school choice" programs, generally present questions under four discrete provisions of the United States Constitution: the Establishment Clause, the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause. *See* Pet. at 15-19. Although petitioners declare that "[t]his case sits at the crossroads of [the issues presented by] all of these [provisions]," *id.* at 19, the case actually sits on a small side road.

The threshold question that has generated the most litigation in this area is whether, and to what extent, the Establishment Clause allows the use of public funds to pay tuition for students to attend sectarian private schools. *See* cases cited in Pet. at 15-17 and nn. 11-12; *id.* at 28-29, n.16. In asserting that "the questions presented [in this case] are of national importance and affect education-reform efforts across the nation," *id.* at 28, petitioners confirm the primacy of the Establishment Clause issue. *See id.* (declaring that "educational reform . . . initiatives have often been hamstrung and delayed by . . . Establishment Clause challenges"); *id.* at 29 (declaring that "[t]he hope for these and other educational-reform efforts depends on a clear ruling from this Court that . . . such initiatives are consistent with the Establishment Clause's . . . mandate").

But, as petitioners acknowledge, *see* Pet. at 15 n.11, no Establishment Clause question is presented in this case, because the Vermont Court held that the tuitioning program at issue is prohibited by the *Vermont* Constitution. *See supra* at 6. As a result, this case does not afford this Court an opportunity to address the fundamental federal constitutional issue presented by "school choice" programs. Furthermore, even if the question petitioners

seek to raise—*viz.*, whether the United States Constitution *requires* that public funds be made available to sectarian private schools in cases of this nature—might otherwise be thought to merit review, in the typical "school choice" case that question is intertwined with the question of whether the Establishment Clause *prohibits* such funding, and the two questions bear directly on each other. *See* cases cited in Pet. at 15-16 and nn. 11-12. It would not be productive for the Court to review this atypical case, in which the question presented by petitioners is not accompanied by the fundamental and interrelated Establishment Clause question that must be considered in arriving at any definitive conclusion as to the constitutionality of the kind of government funding petitioners advocate.

Moreover, petitioners indicate that three distinct constitutional claims can be advanced in support of demands, such as they make here, for public funding of sectarian schools: under the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause. *See* Pet. at 8. But only one of those three claims—a Free Exercise claim—was advanced in this case. Petitioners do not attempt to invoke the Equal Protection Clause, *see* Pet. at i (Questions Presented); and, although they purport to present a question under the Free Speech Clause as well as under the Free Exercise Clause, *id.*, they are precluded from doing so, inasmuch as they did not advance the Free Speech claim below. *See supra* at 6.[8]

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[8] As petitioners appear to recognize, *see* Pet. at 16 n.12; *id.* at 18, in this context claims under the Free Exercise Clause are by no means equivalent to claims under the Free Speech and Equal Protection Clauses. The Free Exercise Clause is implicated only where "government has placed a substantial burden on the observation of a central religious belief or practice," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), by impeding "conduct mandated by religious belief," *Thomas v. Review Board*, 450 U.S. 707, 717-18

In short, any definitive ruling as to the constitutionality of the funding program at issue in this case—and any meaningful consideration of the constitutional status of "school choice" programs generally—would have to address questions arising not only under the Free Exercise Clause, but also under the Free Speech, Equal Protection and Establishment Clauses. This case presents none of those crucial questions. As a result, review of the ruling of the court below would be a purely academic exercise, and resolution of the idiosyncratic Free Exercise question presented here would not even resolve the constitutional status of the program involved in this case, much less that of other "school choice" programs.

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS WITH RESPECT TO THE QUESTION PRESENTED

Petitioners assert that the decision of the Vermont Supreme Court with respect to the Free Exercise issue conflicts with the decisions in *Peter v. Wedl*, 155 F.3d

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(1981). Because petitioners do not allege that their religion requires that children attend a pervasively sectarian school, *see supra* at 4, they cannot satisfy that threshold element of a Free Exercise Claim. *See Brusca v. Missouri*, 332 F. Supp. 275, 279 (E.D. Mo. 1971) (state's refusal to fund sectarian education does not violate parents' rights under the Free Exercise Clause where, *inter alia*, "[p]laintiffs make no contention that attendance at public schools is contrary to the basic precepts or tenets of their religion"), *aff'd*, 405 U.S. 1050 (1972); *Goodall v. Stafford County Day Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995) (where state refuses to pay for cued speech transliterator at a sectarian school, but would pay at a nonsectarian school, there is no Free Exercise claim because, *inter alia*, parents of the affected student "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take"), *cert. denied*, 516 U.S. 1046 (1996). It therefore is apparent that the Free Exercise claim petitioners have advanced stands on a very different footing from the Free Speech and Equal Protection claims that could have been but were not asserted.

992 (8th Cir. 1998); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); and *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 2357 (1999). *See* Pet. at 9-14, 18. There is no such conflict.

The conflict petitioners attempt to generate is based on their characterization of this as "a case about discrimination [against religion]." Pet. at 9. But it is nothing of the kind. Vermont has adopted a simple and evenhanded policy: it offers a free secular education to all students, whether they choose to attend sectarian or nonsectarian schools, but refuses to pay for religious instruction and other religious activity, "wherever [they] occur." App. 53.[9] Consistent with that policy, the State will not pay petitioners' tuition because the school they have chosen (but which their religion does not *require* them to attend, *see supra* at 4) does not separate secular instruction from religious instruction—or indeed, from religious worship—and therefore cannot comply with the limitation "that public moneys . . . not be spent on religious observance, inculcation of religious values, or on religious education." *See supra* at 3.[10]

In adopting this policy, Vermont has done nothing to "prohibit the free exercise" of religion. There is a funda-

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[9] Nor, we hasten to add, does Vermont pay for students to be instructed *against* religion: public schools are constitutionally prohibited from proselytizing against religion, and there is no claim that the private schools that receive tuition from the State have been engaged in such activity.

[10] It is for this reason, and not because of any preference of one religion over another, *see* Pet. at 26-27, that the Vermont Constitution does not permit the payment of tuition to schools in which secular instruction is not separate from religious instruction, while leaving open the possibility of providing funds for secular instruction in sectarian schools that do make such a separation. *See supra* at 7-8.

mental distinction between *prohibiting free exercise*, on the one hand, and *declining to subsidize religious activity*, on the other. The Free Exercise Clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). "The fact that government cannot exact from [a citizen] a surrender of one iota of [his] religious scruples does not, of course, mean that [he] can demand of government a sum of money, the better to exercise them." *Brusca v. Missouri*, 332 F. Supp. 275, 279 (E.D. Mo. 1971) (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)), *aff'd*, 405 U.S. 1050 (1972). There consequently is no "right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise." *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).[11]

There is no conflict among the lower courts as to how this settled principle applies in the context of a Free Exercise challenge to the exclusion of private sectarian schools from programs that provide assistance to other schools. The courts uniformly have rejected such challenges. Petitioners cite three of those decisions. *See* Pet. at 18 (citing *Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me.), *cert. denied*, 68 U.S.L.W. 3247 (U.S. Oct. 12, 1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.),

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[11] This Court has made a similar point in a series of cases holding that the government's refusal to subsidize speech or other protected activities cannot be viewed as an infringement of constitutional rights. *See National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998); *id.* at 2183-84 (Scalia, J., concurring); *Rust v. Sullivan*, 500 U.S. 173, 193, 201 (1991); *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46, 549 (1983); *Harris v. McRae*, 448 U.S. 297, 316-18 (1980); *Maher v. Roe*, 432 U.S. 464, 475 (1977); *Buckley v. Valeo*, 424 U.S. 1, 98 (1976).

cert. denied, 68 U.S.L.W. 3129 (U.S. Oct. 12, 1999); *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989)). There are at least seven others, including two decisions that were summarily affirmed by this Court. *See Brusca, supra; Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974); *Goodall v. Stafford County Day Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *Jackson v. California*, 460 F.2d 282 (9th Cir. 1972); *Nieuwenhuis v. Delavan-Darien Sch. Dist. Bd. of Educ.*, 996 F. Supp. 855, 863 (E.D. Wis. 1998); *Miller v. Benson*, 878 F. Supp. 1209 (E.D. Wis.), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995); *McCarthy v. Hornbeck*, 590 F. Supp. 936, 946 (D. Md. 1984).

Petitioners are mistaken in asserting that the decisions of the Eighth Circuit in *Peter*, the Sixth Circuit in *Hartmann*, and the Fourth Circuit in *Columbia Union College* are to the contrary. None of those cases holds that the Free Exercise Clause requires the government to provide funds to be used for religious activities.

Petitioners' reliance on *Columbia Union College* is particularly quixotic. That decision holds—as this Court previously had held with respect to the same statutory program in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976)—that it is proper (indeed, necessary) that Maryland's program of grants to public colleges requires prospective recipients to "demonstrate that no . . . funds will be used for 'sectarian purposes' including 'religious instruction, religious worship, or other activities of a religious nature.'" 159 F.3d at 154 (quoting the statute). The Fourth Circuit further held, as this Court had held in *Roemer*, that grants *must be denied* "to institutions that are so 'pervasively sectarian' that secular

activities cannot be separated from sectarian ones." *Id.* at 155 (quoting *Roemer*, 426 U.S. at 755). *See id.* at 159 (observing that nothing in later decisions "eviscerates *Roemer's* holding regarding direct money grants"). The Fourth Circuit merely held that further proceedings were necessary in order to determine whether Columbia Union College was in fact a pervasively sectarian school. *Id.* at 164-69. Here, in contrast, it is undisputed that MSJ is such a school. *See supra* at 2-3.[12]

Nor does *Hartmann* support petitioners' position. The Sixth Circuit emphasized in that case that the program from which the plaintiffs had been excluded—which designated the entities authorized to provide care to children of on-duty military personnel—was one that did *not* provide government funding or benefits to the care providers. Finding that "the relationship between the Army and the Provider . . . is solely one of regulator and regulatee," 68 F.3d at 980, the court stated that "a more serious and pressing concern" would arise if the program did "not just regulate, [but] also provide[d] benefits to participants," *id.* at 982.

In *Peter*, the Eighth Circuit, relying on cases that it described as having upheld the use of government funds for "*secular* teaching services at . . . private religious school[s]," 155 F.3d at 955 (emphasis added),[13] ruled that it would not be permissible for the state to deny a disabled child the necessary services of a paraprofessional who would assist [him] with his disabilities, translate [ ]

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12 The District conceded that point below. *See* Appellant's Opening Brief at 21 n.32 ("As a pervasively sectarian institution, MSJ is by definition incapable of segregating secular and religious aspects of its program.").

13 *See also id.* at 996-97 (funds for teaching of "nonreligious subjects").

his finger spelling, and adapt [ ] classroom tasks for [him]," *id.* at 994, merely because the child was attending a sectarian school. It is clear from the Eighth Circuit's analysis that the court saw *Peter* as a case in which a student had been denied government funds for services that could fairly be characterized as *secular*. This is not such a case.

Thus, the holding of the Vermont Supreme Court is consistent with an unbroken line of authority, and does not warrant review.

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Petitioners contend that the Vermont Court's decision conflicts with "the bedrock principle of this Court's First Amendment jurisprudence that the government 'may not . . . impose special disabilities on the basis of religious views or religious status.'" Pet. at 20 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)). As we already have explained, that principle never has been understood to mandate government funding of religious practices, which is what petitioners are seeking. There is nothing to the contrary in the three cases upon which petitioners place principal reliance: *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *see* Pet. at 22-24; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *see* Pet. at 24-25; and *McDaniel v. Paty*, 435 U.S. 618 (1978), *see* Pet. at 25-26.

What was at issue in *Rosenberger* was the government's obligation of neutrality in affording access to a "public forum" created by the government "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. Where the government is not creating such a forum, but rather is deciding how to conduct its own

business, either as "speaker," *id.* at 833, as "transmitt[er] of a message it favors," *id.* at 834, or as "buyer" of services used to "promote a particular government program," *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2190-91 (1998) (Souter, J., dissenting), such "forum" principles are not implicated and the government has every right to "make content-based choices," *Rosenberger*, 515 U.S. at 833, including the right to "determine the content of the education it provides," *id.*

In addition to the fact that *Rosenberger* arose in the very different context of a request for access to a public forum, the case did not involve a demand for the use of general public funds, but rather for participation in the use of a special activities fund made up of payments from students. The Court specifically stated that its "decision . . . cannot be read as addressing an expenditure from a general tax fund," *id.* at 841, and Justice O'Connor emphasized that point in her concurrence, *id.* at 851-52.

Lukumi is, if anything, even less to the point here. That case involved no issue of government funding; it was one of the rare cases (*see* 508 U.S. at 523) in which a statute *outlawed* a particular religious practice.

Nor did *McDaniel* involve a refusal to fund religious activities. Rather, that case stands for the proposition that the state cannot deny an individual a *secular* right or benefit to which the individual otherwise would be entitled (in *McDaniel*, the right to run for public office) because the individual has engaged in a religious practice (in *McDaniel*, serving in the ministry). Here, in contrast, petitioners seek a benefit that is *not* secular: the tuition payment they demand would fund religious education and worship. *See supra* at 4, 7. That benefit is not provided, and need not be provided, by the State to anyone.

In sum, there is no decision of this Court that supports petitioners' contention that the government must provide funding for the religious instruction they wish to receive.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

RUTLAND NORTHEAST SUPERVISORY UNION
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FAX (802) 247-5540

March 16, 1999

Mr. Richard Komer
Institute for Justice
1717 Pennsylvania Ave., NW
Washington, DC 20006

Mr. Jack Facey
71 Allen Street
Rutland, VT

Gentlemen:

At its regularly scheduled board meeting of March 15, 1999, the Chittenden Town School District voted to warn [sic] a revision to their high school tuition policy to prohibit the payment of tuition to sectarian schools.

It is the view of the majority of the current board that payment of tuition to religious schools supports sectarian causes and is thus, an improper use of public funds.

The board has also directed me to notify you that any authority you or any of you have had previously to speak for, represent, or act on behalf of, the Chittenden School Board of Chittenden School District, is hereby terminated. In the event that any ministerial or substantive act remains to be done on behalf of the Board in connection with the pending appeal, no act should be taken without express prior consent of the board.

At the same time, the Chittenden board recognizes that there are contending views on the issues that are now

before the Vermont Supreme Court. The board is aware that all necessary documents have been filed and we are awaiting the decision of the court. By the above actions, the board does not wish to disturb the court's deliberations. We think it in the interests of all to have a clear and unambiguous decision from the supreme court regarding public payments to religious schools.

The board wishes to thank you for all your efforts.

Sincerely,

/s/ William J. Mathis
WILLIAM J. MATHIS, Ph.D.
Superintendent of Schools

(4)

No. 99-628

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

CYNTHIA ANDREWS, *et vir, et al.*,

Petitioners,

v.

VERMONT DEPARTMENT OF EDUCATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

RESPONDENT VERMONT DEPARTMENT OF EDUCATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Free Exercise Clause of the United States Constitution require a Vermont public school district to make direct and unrestricted payments of tuition to a pervasively sectarian school for a religious education?

2. Does the Free Speech Clause of the United States Constitution require a Vermont public school district to make direct and unrestricted payments of tuition to a pervasively sectarian school for a religious education?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Vermont Department of Education, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Vermont Supreme Court, issued on June 11, 1999, reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1-63, reported in *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, No. 97-275, 1999 WL 378244 (Vt. June 11, 1999).

STATEMENT OF THE CASE

The State of Vermont requires each public school district to provide a secondary education to its students unless the district has been organized to provide only an elementary education. *See* VT. STAT. ANN. tit. 16, § 822(a) (1989 & Supp. 1998). The State of Vermont allows its public school districts to choose among several different options to satisfy this requirement. A public school district may maintain its own public high school, *see id.*, or it may pay tuition "to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state." *Id.* § 822(a)(1) (Supp. 1998).[1]

[1] In addition, a public school district may designate an approved independent school, not managed by it, as its high school. *See* VT. STAT. ANN. tit. 16, § 827(a) (Supp. 1998). It also can form a union school district and operate a high school with other public school districts. *See id.* §§ 701-723 (1989 & Supp. 1998). Finally, in certain circumstances, a public school district may choose to maintain a high school while tuitioning some students to a public or private school. *See id.* § 822(c) (Supp. 1998).

Chittenden Town School District, the public school district for children whose parents or guardians reside in the Town of Chittenden, does not maintain its own high school. Instead, it has historically provided for secondary education of its students by paying tuition, pursuant to title 16, section 822(a)(1) of the Vermont Statutes, to various public and independent secondary schools. Until the 1996-1997 school year, the Chittenden School Board authorized the payment of tuition to public high schools or approved nonsectarian secondary schools. In 1996, however, the board decided to allow tuition to be paid, as well, to approved independent sectarian schools, including Mount Saint Joseph Academy ("MSJ"), a parochial high school in Rutland, Vermont.

MSJ is a pervasively sectarian school. *See* Stipulation Regarding Facts of the Case ¶ 54, reprinted, in relevant part, in the Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari ("Resp't Opp'n App."), 3; *see also Chittenden Town Sch. Dist.* at Pet. App., 3-5. In addition, MSJ's revenues are commingled in one bank account, from which MSJ pays all of its operating expenses. *See* Stipulation Regarding Facts of the Case ¶ 83 at Resp't Opp'n App., 3-4; *see also Chittenden Town Sch. Dist.* at Pet. App., 12.

At the time of its decision to pay tuition to MSJ, the Chittenden Town School District funded secondary education through a combination of revenues raised by a local property tax and state-aid-to-education payments

received from Vermont.[2] When the school board voted to allow tuition reimbursement to MSJ, Vermont's Commissioner of Education withheld the Chittenden Town School District's state-aid-to-education payments. The school district then filed suit against respondent in Rutland Superior Court claiming, *inter alia*, that tuition reimbursement to MSJ was constitutional and seeking an order to restore state-aid funding. Respondent counterclaimed that the school district's decision violated the Establishment Clause of the First Amendment to the United States Constitution and Chapter I, Article 3 of the Vermont Constitution.

The superior court allowed two groups of individuals to intervene in the action. One group, consisting of parents, residing in the Town of Chittenden, who sent their children to MSJ for secondary education and who sought payment of the MSJ tuition by the school district, aligned themselves with the Chittenden Town School District. The other group, consisting of residents of the Town of Chittenden who opposed the use of their state and local tax payments to fund sectarian education, aligned themselves with respondent.

The parties submitted this case to the superior court on stipulated facts. The superior court concluded on the merits that "tuition payments from a school district to

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[2] Following the Vermont Supreme Court's decision in *Brigham v. Vermont*, 692 A.2d 384 (Vt. 1997), the Legislature replaced the school finance system with one that provides for funding through the combination of a state-wide property tax and equalized, optional local property taxes. *See* VT. STAT. ANN. tit. 16, §§ 4000-4029 (Supp. 1998).

pervasively sectarian high schools, or the parents of the children who attend, would have the effect of a direct subsidy to religious schools in violation of the United States and Vermont Constitutions." *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, No. 20478-96 RcC (Rutland Super. Ct. June 27, 1997) at Pet. App., 114-15.

On appeal from the superior court to the Vermont Supreme Court, Chittenden Town School District and petitioners argued that (1) tuition payment to MSJ does not violate either the United States Constitution or the Vermont Constitution because it is based on a parent's free choice of educational provider, and (2) reversal of the school district's decision to pay tuition to MSJ would violate the Free Exercise Clause of the First Amendment to the United States Constitution. On June 11, 1999, the Vermont Supreme Court affirmed the superior court's decision. The Vermont Supreme Court concluded that the Compelled Support Clause of Chapter I, Article 3 of the Vermont Constitution prohibited "the Chittenden Town School District tuition-payment policy to the extent it authorizes tuition reimbursement to sectarian schools without appropriate restrictions." *Chittenden Town School Dist.* at Pet. App., 54-55. The Vermont Supreme Court further concluded that the Free Exercise Clause of the United States Constitution was not implicated because "today's ruling requires no one 'to choose between following the precepts of [his or her] religion and forfeiting benefits' that would otherwise be available from the government." *Id.* at Pet. App., 54 (quoting *Sherbert v. Verner*,

374 U.S. 398, 404 (1963)). Based on this decision, petitioners filed their Petition for Writ of Certiorari.[3]

REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the Vermont Supreme Court's decision in this case. First, the issues the petitioners wish to present to the Court are not properly framed in the record. Second, and more fundamentally, this Court and the lower courts have clearly and unequivocally stated that direct subsidies to pervasively sectarian schools for religious education are unconstitutional. Finally, this Court has never suggested that the exercise of a constitutional right requires public subsidization.

I. THE COURT SHOULD DENY THE WRIT BECAUSE THE ISSUES ARE NOT PROPERLY FRAMED.

A. FREE EXERCISE OF RELIGION

Petitioners ignore a fundamental deficiency in the record. While petitioners allege that their constitutionally guaranteed right to the free exercise of religion was abridged by respondent, they fail to claim in their petition and failed to prove in the courts below that sending their children to MSJ was mandated by their religion. "The free exercise inquiry asks whether government has

[3] The Chittenden Town School District has not joined with the petitioners in this Petition.

placed a substantial burden on the observation of a central religious belief or practice . . . . " *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *see also Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (to succeed on a Free Exercise claim, aggrieved party's religious belief must not be "merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living").

While two petitioners did state that they were sending their children to MSJ for religious reasons,[4] none of the petitioners claimed below nor do they claim now that they chose MSJ because of a central religious belief or practice or because the Catholic church mandated such an education. *See* Stipulation Regarding Facts of the Case ¶¶ 21-28 at Resp't Opp'n App., 2-3. This Court need not consider alleged violations of religious rights where it is less than clear that religion is actually at issue.

B. FREE SPEECH

Petitioners' Free Speech claim was neither properly presented to the Vermont Supreme Court nor addressed by the *Chittenden Town Sch. Dist.* decision. This Court has consistently held that:

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[4] Petitioner Sherrie D. LaFemina stated that she "chose Mount Saint Joseph's Academy for her daughter because of her religious beliefs." Stipulation Regarding Facts of the Case ¶ 21 at Resp't Opp'n App., 2. Petitioner Robert Kirn stated that "[a]s a Catholic, MSJ's Catholic basis was also very important to him." Stipulation Regarding Facts of the Case ¶ 25 at Resp't Opp'n App., 2.

> [w]ith 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, 86 (1997) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)). Furthermore, this Court has placed the burden on the aggrieved party to show that the issue was properly presented to the court below. *See Adams*, 520 U.S. at 86 ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented.").

The Vermont Supreme Court did not expressly decide whether the respondent's refusal to subsidize a sectarian school infringed on petitioners' Free Speech rights. Moreover, petitioners failed to properly present this issue to the court below. Petitioners never raised their Free Speech claim in their principal brief. In their reply brief, which focused mainly on state constitutional claims and their Free Exercise and Establishment Clause claims, petitioners included a section entitled: "The Department's Attempt to Limit and Control Expression Undermines Key Constitutional Values, Structures and Relationships in Violation of the First Amendment." *See* Intervenors-Appellants' Reply Br., reprinted, in relevant part, at Resp't Opp'n App., 6. The discussion that followed, however, was both confusing and convoluted, *see* Intervenors-Appellants' Reply Br. at Resp't Opp'n App., 5-11, and concluded with the petitioners' request that the Vermont Supreme Court: (1) "make clear to the Department that it

has no power to determine whether payment of tuition would offend the Establishment Clause;" and (2) "uphold the entirely neutral [s]tatute as [w]ritten, and the rights of all parents to make their own genuinely independent and private choices." Intervenors-Appellants' Reply Br. at Resp't Opp'n App., 10-11 (citations omitted). In sum, petitioners failed to present this issue with "fair precision," *Adams*, 520 U.S. at 87, and thus, this Court need not consider petitioners' Free Speech claim.

II. THE VERMONT SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

In developing its First Amendment jurisprudence over the past thirty years, this Court has focused on the specific feature of the particular government action before it, while cautioning that the Court's precedents remain intact unless directly overruled. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). All the while, the Court has consistently and clearly stated that neither the Establishment Clause nor the Free Exercise Clause requires direct governmental financial subsidies to a sectarian school for a religious education. The invalidity of direct payments to religious schools for a religious education has never been questioned.

In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court struck down direct unrestricted grants to sectarian schools pursuant to the Establishment Clause. *See id.* at 774-76. In *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976), this Court reiterated that:

> [t]he State may not . . . pay for what is actually religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

Id. at 747. In *Mueller v. Allen*, 463 U.S. 388 (1983), while upholding tax deductions for actual expenses incurred for tuition, textbooks and transportation of dependents attending private sectarian as well as private secular and public schools, the Court contrasted this form of aid with the direct transmission of subsidies from the state to sectarian schools. The Court considered the latter form of aid to be invalid. *See id.* at 399 & n.11. In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), in upholding financial vocational assistance to a blind person at a religious college, the Court again emphasized that it is well-established "that the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* at 487 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 394 (1985)).

Likewise, in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), in upholding the provision of a sign language interpreter for a student at a religious school, the Court noted that such services were not a direct financial support to a pervasively sectarian institution. *See id.* at 12-13. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court upheld the expenditure of school money to pay an independent contractor to print a student religious newspaper. The Court, however, "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian

institutions." *Id.* at 842. In a concurring opinion, Justice O'Connor reiterated that the Court's decisions "provide no precedent for the use of public funds to finance religious activities." *Id.* at 847 (O'Connor, J. concurring). Finally, this Court's decision in *Agostini* dealt with the provision of supplemental, remedial instruction – secular in nature – to private and parochial school students. The Court reasoned that these services were supplemental and did not relieve sectarian schools of costs they otherwise would bear in educating their students. *See* 521 U.S. at 228. The Court emphasized that no funds ever reached the coffers of religious schools and reiterated that the nature of the aid remains a critical factor. *See id.* at 228, 232.

This Court's cases, therefore, have consistently held that direct financial subsidies to a pervasively sectarian school for religious education are unconstitutional. The Vermont Supreme Court's decision is in full conformance with this Court's unwavering holdings on the subject.[5]

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[5] Petitioners' reliance on the holdings in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) and *McDaniel v. Paty*, 435 U.S. 618 (1978) is misplaced. Neither of these cases even remotely dealt with the issue of the constitutionality of the government providing direct financial subsidies to pervasively sectarian schools.

III. THE VERMONT SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR ANY FEDERAL CIRCUIT COURT.

Petitioners claim that three decisions from various United States Courts of Appeals conflict with the Vermont Supreme Court's decision in *Chittenden Town Sch. Dist.* The cases cited, however, are not in conflict with the decision below. The decision in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), involved the provision of a full-time paraprofessional to function in a classroom for a severely disabled student, a service more akin to the provision of an interpreter in *Zobrest* and unlike the direct and unrestricted payment of tuition at issue in *Chittenden Town Sch. Dist.* *See Peter*, 155 F.3d at 994. In *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 2357 (1999), the Fourth Circuit held that direct funding to pervasively sectarian institutions would violate the Establishment Clause and remanded the matter to determine whether the institution was, indeed, pervasively sectarian. *See id.* at 162-63, 169. Finally, in *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), the Sixth Circuit held unconstitutional a United States Army regulation prohibiting on-base family child care providers from having any religious practices during day care. The court expressly noted that there was no evidence showing that government funds were reaching these day care providers. *See id.* at 982 (government funds go "toward the administration of the program and toward other parts of the Army's comprehensive child care program"). Contrary to petitioners' contention, the holdings in these cases do not require the government to provide direct

subsidies to religious schools. Indeed, each court goes to great pains to distinguish the particular aid at issue from direct and unrestricted financial subsidies. Thus, there is no conflict and no present need to address this issue.

IV. THE RIGHT TO SEND ONE'S CHILD TO A SECTARIAN SCHOOL DOES NOT INCLUDE THE RIGHT TO HAVE THE GOVERNMENT PAY FOR RELIGIOUS EDUCATION.

Petitioners allege that the First Amendment affirmatively requires the government to pay tuition of students who attend MSJ. Courts have consistently rejected such claims. For example, in *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995), the Fourth Circuit Court of Appeals concluded that a local school board did not violate the Free Exercise Clause when it declined to pay for a speech interpreter at plaintiff's son's private sectarian school. *See id.* at 173. The Court noted at the outset that "[i]t is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.' " *Id.* at 171 (quoting *Braunfield v. Brown*, 366 U.S. 599, 605 (1961)). Relying upon this Court's decision in *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983) ("We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.") (citation omitted), the *Goodall* court concluded that the government's refusal to pay did not substantially impinge on plaintiffs' Free Exercise rights:

> the Goodalls have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take. Rather, they must pay for a cued speech transliterator if they decide to keep Matthew in a sectarian school and to forego the advantages offered by the public school system in Stafford County.

Id. at 172-73.

Other courts have, with the same reasoning, rejected the Free Exercise argument advanced in this action. *See, e.g., McCarthy v. Hornbeck*, 590 F.Supp. 936, 945 (D. Md. 1984) ("In essence, plaintiffs are here seeking a state subsidization of a part of the cost of sending their children to private, church-related schools. The Supreme Court has consistently held that a statute does not impinge on a constitutional right merely because it does not subsidize that right.").

The State of Vermont has done nothing to preclude any parent from sending his or her child to MSJ for religious reasons or from practicing his or her religion. The State has no obligation to subsidize a religious education. On the contrary, it is barred from doing so by the First Amendment of the United States Constitution and, as recognized in the *Chittenden Town Sch. Dist.* decision, by Chapter I, Article 3 of the Vermont Constitution.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.[6]

Respectfully submitted,

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[6] The request by *Amici* that the Petition be held pending a decision in *Mitchell v. Helms*, 151 F.3d 347 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 2336 (June 14, 1999) (No. 98-1648) is unwarranted. As *Amici* readily acknowledge, *Mitchell* involves issues concerning the Establishment Clause while this case exclusively deals with free exercise and free speech questions.

STATE OF VERMONT	**RUTLAND SUPERIOR COURT**
RUTLAND COUNTY, ss	**DOCKET NO. S0478-97RcC**

CHITTENDEN TOWN SCHOOL DISTRICT,
Plaintiff,
and
CYNTHIA and DOUGLAS ANDREWS, et al.,
Plaintiff Intervenors,
v.
VERMONT DEPARTMENT OF EDUCATION, et al.,
Defendants,
and
ELIZABETH SOJOURNER, et al.,
Defendant Intervenors.

STIPULATION REGARDING FACTS OF THE CASE

For purpose of this litigation only, the undersigned parties stipulate to the facts that follow. The parties' stipulation as to the accuracy of these facts does not necessarily imply agreement as to their legal relevance.

* * *

21. Sherrie D. LaFemina chose Mount Saint Joseph's Academy for her daughter because of her religious beliefs.

22. Jason Poljacik indicated that he wished to attend MSJ, and Nancy Poljacik enrolled him there, because they believe that it was small, offered a value-based education, and had a good educational reputation.

23. The Pratts selected MSJ for their two children because they believe it to be a small, family oriented school with low student/teacher ratios, offering value-based education, strict discipline, and an excellent academic program.

24. Cynthia Andrews enrolled her son in MSJ because he wanted to attend there and because she believed that it provided a structured environment where he would receive greater individual attention, be provided with a curriculum that included consideration of values and ethics, and be treated as an individual and not as a number.

25. Robert Kirn became unhappy with the education and environment that his daughter experienced when she was enrolled in Rutland High School. Mr. Kirn enrolled her in MSJ because he felt it emphasized competence in the basics of education, offered students an opportunity to develop their own values, and stressed personal integrity and community service. As a Catholic, MSJ's Catholic basis was also very important to him.

26. After looking at other local schools, Michael Falk indicated that he wished to go to MSJ. Christine Falk

enrolled Michael and Robin in MSJ because of Michael's wishes and because she felt that the school is staffed with very approachable teachers, provides a high degree of individual attention in small classes, and offers a value-based education.

27. Tyler Tracy attended a large public school in Maine for junior high school, but, after visiting at MSJ, he requested that his father enroll him there.

28. William Tracy, a non-Catholic, enrolled his son in MSJ because of his son's request and because he felt that it provides a structured, disciplined, and caring environment that does not permit the foolishness that he believes takes place in the public schools. Mr. Tracy feels that the required study of Christianity and the Catholic Church provides information critical to the understanding of the development of Western history. He does not feel that the degree of religion present at MSJ rises to the level of indoctrination or proselytism.

* * *

54. MSJ is a pervasively sectarian institution, in that the secular and sectarian aspects of its educational program are intertwined, and the school is operated in accordance with the directives and policies of the Roman Catholic Diocese of Burlington and the State of Vermont.

* * *

83. With the exception of a few separate scholarship accounts, MSJ maintains one bank account in which it deposits all revenues, including but not limited to tuition payments, and from which it pays its operating expenses, including the costs of maintaining its physical facilities.

Other than the few scholarship accounts, MSJ does not subdivide or allocate in any way funds received; nor does MSJ separately account for sectarian related expenditures or secular educational expenditures.

* * *

IN THE SUPREME COURT

OF THE

STATE OF VERMONT

CHITTENDEN TOWN SCHOOL DISTRICT
Plaintiff/Appellant

Supreme Court
Docket No. 97-275

and

CYNTHIA & DOUGLAS ANDREWS,
et al.,
Plaintiff-Intervenor/Appellants

vs.

VERMONT DEPARTMENT OF EDUCATION,
et al.
Defendants/Appellees

and

Appeal from the
Rutland Superior Court
Docket No. S0478-96 RcC

ELIZABETH SOJOURNER, et al.,
Defendant-Intervenor/Appellees

REPLY BRIEF

OF

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* * *

D. The Department's Attempt to Limit and Control Expression Undermines Key Constitutional Values, Structures and Relationships in Violation of the First Amendment.

As the ACLU explicitly concedes, this conflict is about whether government can control speech. ACLU-NEA Brief, 33.[21] The evolving record of this case plainly establishes that the Department controls and limits content in pursuit of its goal of controlling and limiting content. The Department's means and its ends both betray the core principles that undergird representative democracy. This is a necessary inference from the relationships created by the structure of the U.S. Constitution.

Prof. Philip Bobbitt's catalogue of the varieties of constitutional argument describes "structural arguments as inferences from the existence of constitutional structures and the relationships that the Constitution ordains among the structures of government."

> Structural arguments are largely factless and depends on deceptively simple logical moves from the entire constitutional text, rather than from one of its parts. At the same time, they embody a macroscopic prudentialism, that is,

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[21] Control is appropriate, they argue, because government "is itself acting as a speaker." *Id.*, 33-34. In fact, the neutral criteria applied in the Statute as Written ensure that any funds which get to MSJ are the " 'result of the private decision of individual parents' and '[could] not be attributed to state decisionmaking.' " Agostini, *supra*, 117 S.Ct. at 2012; *see also*, Campbell, *supra*, 161 Vt. at 455. Thus, this is a case of government controlling private speech.

> not one drawing on the peculiar facts of the case, but rather one arising from those general assertions about power and human nature we call common sense.

Bobbitt, *Constitutional Fate*, 58 Tex.L.Rev. 695, 721-22 (1980). We suggest that one classic explication of the First Amendment from a structural perspective harmonizes the interests at issue here, predicts and explains that Courts will do what they've done, and justifies the result in terms of preserving the critical values of democratic self-government. Both elements mentioned by Bobbitt – "deceptively simple logical moves from the entire constitutional text" and "general assertions about power and human nature [from] common sense" are found in Chancellor Mark Yudof's, When Government Speaks: Politics, Law & Government Expression in America, (U.Calif. 1983). Yudof argument is built on two "deceptively simple," fundamental premises about the nature of representative democracy. Both derive clearly from the constitution as a whole, rather than from any of its parts.

> First, in a representative democracy public officials must by definition represent the preferences of the majority in some sense, or at least be responsive to preferences in a procedural setting that is recognized as fair and legitimate. Second, the essence of democratic government is that autonomous, self-controlled citizens have the opportunity to make informed, intelligent judgments about government policies, free of state preceptorship that substantially impedes individual choice and consent.

Id., 152. The First Amendment was intended to protect the people's ability to inform and decide, Yudof argues,

but was focused on the specific threat perceived by the Founding Fathers from their historical perspective.

> [T]he text of the First Amendment, addressing itself to congressional abridgement of "freedom of speech" rivets attention to governmental interference with speech in the private sector. . . . This is hardly surprising, given the primitive state of mass communications in the second half of the eighteenth century. Government censorship of individual expression, particularly by the newly formed federal government, was the central speech problem of that age.

Id., 17-18. Yudof contends that courts and legal scholars have "failed to grapple with the realities of communications in the twentieth century," "concern[ing] themselves with government attempts to regulate private speech and ignor[ing] the massive role of governments in communication networks." *Id.*, xv.

> The expansion of government at all levels has increased its opportunity to communicate with the populace. . . . As government and its opportunity to communicate have expanded, so have its institutional interests as perceived by its functionaries. Inevitably, government, or those who are a part of it, seeks to persuade citizens to act, or to allow it to act differently than they would have without the information supplied by government. The transfer of information thus becomes a policy tool. The obvious danger is that government persuaders will come to disrespect citizens and their role of ultimate decider, and manipulate them by communicating only what makes them accede to government's plans, policies, and goals.

Id., 6. The Department's conduct of this case illustrates the danger. The record shows that the Department, from the time Campbell was released, has attempted to control information and manipulate results. Its seizure of Chittenden's funds violated established processes of decision. Its miscommunications of the law and facts both here and below are obvious efforts to get what it wants in the face of decisions given by law to others. Yudof argues that the First Amendment protects against these efforts by the Department to make citizens and courts "accede to government's plans policies and goals." Though directed at a specific 18th century threat,

> First Amendment principles go significantly beyond protecting the rights of individuals to express positions inconsistent with the prevailing wisdom or policies of government. Informing such democratic aspirations as majority rule and representative government are notions of informed consent of the governed and of a continuous process of consultation with the people. If the government dominates the flow of ideas and information, the ideal of the self-controlled citizen, making informed choices about his government, is destroyed. This, in turn, means that the people may be more responsive to the wishes and agenda of their leaders than the leaders are to the preferences of those whose welfare they oversee. The First Amendment then should be perceived as protecting the processes of consent – as seeking to prevent the mutilation of the independent judgment of the citizenry.

Id., xv-xvi. Yudof suggests that "concerns about government expression and the need to foster pluralism may be

treated as additional factors to be considered when individuals seek to vindicate traditional First Amendment rights." *Id.*, at 200. We urge the Court to adopt this approach.

> [P]lausible reasons justify consideration in traditional First Amendment cases of the need to limit government power to distort the citizen's judgment, falsify consent, and overwhelm other communications centers. Protection of private expression . . . enhances liberty in two senses: it affirmatively promotes the autonomy of the self-controlled citizen, and it poses obstacles to government domination of communications networks.

Id., at 201. "How should the fear of government communications excesses be factored into" traditional analysis? *Id.* Yudof suggests two considerations:

> Any judicial decision protecting the right of *private* individuals, groups, or organizations to speak strengthens their ability to communicate and increases their potential to counter government messages. . . . The structural advantages of pluralism are best achieved by strengthening all elements of private-sector communication to offset the superior ability of the government to convey its message.

Id., at 201-202.

We urge the Court to vindicate these values. It should, make clear to the Department that it has no "power to determine whether payment of tuition would offend the Establishment Clause," Campbell, *supra*, 161 Vt. at 447, with appropriate sanctions for the present incursion. Second, uphold the "entirely neutral" Statute

as Written, and the rights of all parents to make their own "genuinely independent and private" choices. *Id.*, at 454, 455.

* * *

Supreme Court, U.S.
FILED
DEC 1 1999
CLERK

No. 99-628

In The

Supreme Court of the United States

CYNTHIA ANDREWS, *et vir, et al.*,

Petitioners,

v.

VERMONT DEPARTMENT OF EDUCATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The question presented in this case is whether the First Amendment allows government to discriminate on the basis of religion in funding school-choice education programs that include private schools. In the Petition, we showed (1) that this issue is nationally important; (2) that this issue is recurrent; and (3) that this issue has generated extraordinary and pervasive conflicts among lower and federal state courts, and between decisions of lower courts and this Court.

The briefs in opposition do not dispute these points. Indeed, respondents concede that the constitutional issues surrounding various school choice programs are important. Intervenor Op. at 10-11 (referring to "fundamental federal constitutional issue" presented under Establishment Clause); *id.* at 12 (characterizing Free Speech and Establishment questions as "crucial"). *Cf.* State Op. at 8-13. Respondents simply question whether this case presents *an appropriate vehicle* for addressing these important issues (State Op. at 5-8; Intervenor Op. at 9-12) and argue that, in any event, the decision below is correct on the merits (State Op. at 8-13).

We think the issue is fairly joined at this point: Is this case an appropriate vehicle for addressing an undeniably important set of First Amendment issues on which the lower courts are badly divided and in need of direction? This Reply Brief will focus chiefly on that question.

1. Since the Petition was filed, there have been some relevant developments. First, this Court has denied certiorari in two cases presenting issues similar to the ones presented here, with respect to a Maine tuition reimbursement statute, *Bagley v. Raymond School Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 120 S.Ct. 364 (1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 120 S.Ct. 329 (1999), and has also denied certiorari in a case presenting an Establishment Clause challenge to a somewhat different state school-choice program. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606, *cert. denied*, 120 S.Ct. 283 (1999). These cases obviously highlight the recurring nature of the issues presented here. We do not know whether certain features of those cases might have

made them less than ideal vehicles for considering the constitutional issues surrounding school choice programs. It is clear, however, from another new development, that this Court considers the First Amendment issues involved to be *important*: Just a few weeks ago, this Court granted a stay of a preliminary injunction issued by a federal district judge against the inclusion of students attending religious schools in a school-choice program for disadvantaged children in Cleveland, Ohio. *Zelman v. Simmons-Harris*, 1999 WL 1007170 (U.S. Nov. 5, 1999).

The grant of a stay in the Cleveland case is, we submit, of special significance: the district court's preliminary injunction in that case had precisely the same effect on that program as the Vermont Supreme Court's decision has had in the instant case: court-mandated discrimination on the basis of religion in an otherwise facially religion-neutral school-choice program. This Court's decisions in stay application cases have noted that an application under the circumstances of *Zelman* will be granted only if there is (i) a reasonable possibility that four Justices will vote to grant certiorari; and (ii) a "fair prospect" or "significant possibility" that a majority of the Court will conclude that the decision below was erroneous. STERN, GRESSMAN, SHAPIRO, & GELLER, SUPREME COURT PRACTICE (7th ed. 1993) § 17.19 at 693 (collecting cases). The prospect of irreparable injury resulting from a lower court's order is also a relevant factor. *Id.* at 692-93. The grant of the stay in *Zelman*, we respectfully submit, suggests both a strong likelihood that the decision of the district court in *Zelman* is erroneous and that the error would result in irreparable injury to the families involved, absent a stay.

These same factors strongly counsel review in the instant case. The decision of the Vermont Supreme Court accomplishes the same injury as did the district court's preliminary injunction in *Zelman*: exclusion of hundreds of families from the benefits of a neutral tuition-benefit program, solely on the ground of the religious nature and content of a family's chosen school. The decision of the Vermont Supreme Court presents essentially the same issues as *Zelman* and is equally likely – indeed, we submit, more likely – wrong on the merits:

the Vermont Supreme Court held, incredibly in our view, that a state education agency may single out "religion, religious ideas, religious people, or religious schools" (*Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part)) for direct discriminatory exclusion from a facially-neutral government program, *even assuming that the Establishment Clause does not require such discrimination*, and further held that such discrimination does not violate the Free Exercise Clause *even when the discrimination is explicitly based on the degree of religious content, values, and viewpoints in a religious school's curriculum.*

With respect, we submit that this holding makes a compelling case for this Court's review. It is clear that the questions presented are important and will not go away until this Court resolves them. The lower courts are hopelessly divided on these fundamental points of law, with no consensus even remotely in view. *See* Pet. at 15-19.

2. We submit that the key features of the Vermont program, and the factual record, make this case an excellent vehicle for considering the important First Amendment issues involved:

- The Vermont program, as adopted by the state legislature, does not discriminate on the basis of religion, but instead authorizes tuition payments or reimbursement to any approved school, public, private nonreligious, or private religious. The local school district in this case (the town of Chittenden), the democratically elected body closest to the people, wished to provide tuition payments pursuant to the statute on a religion-neutral basis, but were forbidden to do so by state education officials. The discrimination on the basis of religion in this case arises from the decision of state education bureaucrats and judges, *not* from the statute itself or the actions of the local school board.[1]

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[1] This differs from the arrangement at issue in the Maine cases, where the legislature has chosen to exclude from the tuition reimbursement

- The Vermont program is not experimental or newfangled. It is a traditional program of long standing, in place in the State of Vermont for over 130 years.
- The Vermont program is genuinely and reliable neutral with respect to religion. It involves no discretionary funding by the State. Any tuition payments or reimbursements flow to religious schools only as a result of the private decisions of parents. The program is in no way skewed toward religion, in theory or in practice. The Record below shows that 67.2% of families in the year in question used the benefit to attend public schools and only 32.8% of the families – less than a third – used the benefit to attend private schools. Further, the Record shows that *less than a third of the eligible private schools are religiously-affiliated*. *See* Pet. at 4, n.2.
- The Record shows that the tuition payments under the Vermont program in this case *do not cover the full cost of attendance at the religious school*, but cover only about 50-60% of actual instructional costs, the remainder being provided by private funds. There is thus little doubt, on these facts, that the Vermont program does not effectively "subsidize" the religious component of the school's instructional program (to the

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program religiously-affiliated schools. *See Bagley, supra*; *Strout, supra*. We do not mean to suggest that the constitutional issues should come out differently in these two situations. We merely note that the petitions in the Maine cases would have called upon this Court to overturn the acts of a democratically-elected legislature. This petition asks the Court to *sustain* the constitutionality of the legislative act in question.

As noted in the Petition, a change in the composition of the Chittenden Town School District led it to abandon this litigation and assume a neutral position. Pet. at 6 n.5. The school district has not filed a brief in opposition.

extent such elements might be thought separable). The potentially complicating issue of *de facto* economic subsidy to the religious element of the school's mission is simply not presented on the facts of this case.

- There is no dispute about the quality, under secular standards, of the educational program of the school petitioners seek to attend. *See* Pet. at 4 n.3, Pet. App. 5. Indeed, there is no dispute about the quality of any of the schools that are qualified, under state criteria, to accept students under the tuition payment program.
- At the same time, the Vermont program, as authoritatively construed by the Vermont courts, involves no regulation of the instructional program or employment practices of religious schools, thus presenting no issue of state "entanglement" in the operations, content, or institutional autonomy of religious schools. Ironically, that is precisely what the Vermont Supreme Court found objectionable: the fact that the tuition program imposed no religious-content or religious-viewpoint restrictions on the schools families choose. Pet. App. 11-12, 52. The Vermont Court thought that the program would be permissible . . . *if* better controls were in place to prevent a religious school from engaging in the expression of religious messages, values, and ideas in the course of providing a quality education. *Id.* at 11-12, 53.
- This case thus presents, squarely and singularly, the important issue of *discrimination against religion*. The explicit ground of decision by the Vermont Supreme Court was that state law (specifically, Chapter I, Article 3 of the Vermont Constitution) *requires* discrimination on the basis of religion in administration of the tuition program and that the program violates state law to the extent that it does not discriminate on the

basis of *how religious* a school is in its education program. Pet. App. at 11 & n.6; 51-52.

3. The intervenor-respondents maintain that this case is not an appropriate vehicle for review because "no Establishment Clause question is presented in this case." Intervenor Op. at 10. These respondents characterize the Establishment Clause issue as "fundamental" and "crucial." *Id.* at 10, 12. The State respondents, however, explicitly invoke this Court's Establishment Clause cases as justification for the decision below, State Op. at 8-10, thus raising the "crucial" issue their co-party thought so sadly absent.

The State's brief makes clear that, were certiorari granted, the State would defend the judgment below on the ground (among others) that equal treatment of religious schools under the statute violates the Establishment Clause. We believe this argument would have been available to the State in any event, as a ground supporting affirmance. The issue was argued below, and the fact that the *opinion* below does not rely on this ground is not dispositive. In any event, the Vermont Supreme Court's views on this question are set forth in *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 641 A.2d 352 (1994). The Vermont Supreme Court, like the Wisconsin, Arizona and Ohio highest state courts, has found no Establishment Clause violation in a neutral school choice program that includes religious schools. The Maine Supreme Court, the First Circuit, and the Northern District of Ohio have reached precisely the opposite conclusion. *See* Pet. at 19. This undeniably important issue, which has produced a massive split among lower courts, is clearly present in this case as part of the State's defense to petitioners' constitutional claims. Neither set of respondents attempts to deny the existence of the conflict or the importance of the issue.

4. Both sets of respondents say that the facts of this case do not even *present* an issue under the Free Exercise Clause. State Op. at 5-6; Intervenor Op. at 13-14. If respondents are sincere in this, they have made out a compelling case for *granting* certiorari: It is bad enough that state and

local governmental officials often make the mistake of thinking that they are *required to discriminate against religion* in education benefit programs (State Op. at 8-10) – the Establishment Clause issue. It is even worse if such officials believe – as the state officials here appear to believe – that, even if the Establishment Clause does not require religion-based exclusion from government education programs, such discrimination in any event is *permissible* under the Free Exercise Clause, on the theory that (1) the right of free exercise does not apply to such discrimination unless a specific religious tenet requires attendance at a religious school, *id.* at 6 ("none of the petitioners claimed . . . the Catholic church mandated such an education"); and (2) the Free Exercise Clause does not apply to programs involving expenditure of funds for an education program or benefit. *Id.* at 12-13.

With all due respect, this is simply absurd. Under respondents' view, a law prohibiting regular church attendance would, as applied to many Christians and Jews, not raise a Free Exercise Clause issue, since few denominations formally *require* attendance even on important holy days. That is emphatically not the law. As Judge Noonan has persuasively put it: "Francis of Assisi was exercising his religion when he gave his costly clothes to the poor; if a government had tried to prevent the gesture it would have violated his free exercise although he acted from no binding precept. . . . There is nothing in the First Amendment's guarantee of the free exercise of religion that restricts the guarantee to the requirements of a church." *Peterson v. Minidoka County Sch. Dist.*, 118 F.3d 1351, 1357 (9th Cir. 1997) (Noonan, J.).[2]

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[2] The Free Exercise Clause "standing" of the families who specifically mentioned religious reasons for choosing the religious school in this case is clear. We believe that the families who did not list their religious beliefs as the specific motivation for choosing religious education are no less protected by the Free Exercise Clause. Where the nature of the asserted Free Exercise Clause violation is *discrimination against religion*, this Court has not required a separate showing of "substantial burden" on a specific religious practice; the discrimination itself is sufficient to trigger strict scrutiny. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S.

Respondents also argue that the Free Exercise Clause is not implicated if government discrimination on the basis of religion occurs in the context of education funding programs. State Op. at 12-13; Intervenor Op. at 17-18. In part, this is simply a repetition of the mistaken view that the Establishment Clause requires or authorizes such discrimination. *See* Pet. at 10 n.8. Insofar as this view rests on a reading of the Free Exercise Clause alone, we showed in the Petition that this view – and the decision below – conflicts directly with the decisions of the Fourth, Sixth, Eighth, and Ninth Circuits, interpreting the Free Exercise Clause,[3] conflicts in principle with this Court's holding in *Church of Lukumi Babalu Aye*, 508 U.S. 520, and conflicts in principle with this Court's free-speech holding in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

Respondents would distinguish these cases (and thus attempt to deny the conflict between this case and such decisions) on the ground that the Free Exercise Clause "does not include the right to have the government pay for a religious education," State Op. at 12, even under a facially neutral program of school choice such as the Vermont program. Respondents characterize the question as one in which petitioners seek "subsidies." *Id.* at 10; Intervenor Op. at 14. Of course, this is misleading in the extreme. Petitioners do not seek "subsidization" but only equal treatment – nondiscrimination – within an existing program. Petitioners do not seek any new financial benefit or special assistance; they

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520, 533-34 (1993); *accord Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995); *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 849-850 (3d Cir. 1994); *Rader v. Johnson*, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1997).

[3] *Columbia Union College v. Clark*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 2357 (1999); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998); *Zobrest v. Catalina Foothills School District*, 936 F.2d 1190, 1196-97 (9th Cir. 1992), *rev'd on Establishment Clause ground*, 509 U.S. 1 (1993). The decision of the court below is consistent with those of the Maine Supreme Court, the Washington Supreme Court, and the First Circuit. Pet. at 17-18. The result is a direct 4-4 split among lower courts on the Free Exercise issue.

simply want not to be discriminated against in the administration of a program the legislature has already seen fit to adopt and that has been in place for well over a century.

Respondents' position, shorn of its misleading language, merely restates the question for review: *Does the Free Exercise Clause permit government to deny an educational benefit to otherwise eligible parents and children solely on the basis of the religious nature of a family's chosen private school?* The lower courts are sharply divided on this important question; and that question is squarely presented by this case, as the briefs in opposition confirm.

5. Finally, respondents argue that the Free Speech Clause claim is not properly before this Court because it was not raised in the courts below. State Op. at 6-8; Intervenor Op. at 11. This is wrong on two grounds. First, the claim *was* made below, both by the Chittenden School District and by petitioners. *See* Pet. at 9 n.7. It is true that the Vermont Supreme Court did not separately discuss it in the opinion below, but that is not a bar to review; only if an issue is *neither* pressed *nor* passed on below is review inappropriate. *Illinois v. Gates*, 462 U.S. 213, 219-223 (1983). Second, respondents ignore the fact that the Free Speech Clause issue to a significant degree arises *from the content of the Vermont Supreme Court's decision itself.* The opinion below explicitly carves out a distinction in eligibility for the benefit based not simply on whether a school is religious in affiliation, but on *how religious* it is in the "content of that education." Pet. App. 51-52. This surprising holding presents the Free Speech Clause issue, pressed by petitioners in the court below, in even sharper relief than before. Plainly, if this Court were to grant review of the judgment below, that review fairly includes the question whether the Vermont Supreme Court's distinction based on the *content* of a religious school's program is consistent with the First Amendment. That question sounds naturally in the Free Speech Clause, as well as the

Free Exercise Clause, and both provisions were invoked by petitioners in the courts below.[4]

CONCLUSION

For these reasons, and those stated in the Petition, we urge this Court to grant the Writ of Certiorari.

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[4] Similarly, the issue of discrimination *among* religions, an issue sounding both under the Free Exercise Clause and the Establishment Clause, *see Larson v. Valente*, 456 U.S. 228 (1982), arose as a consequence of the Vermont Supreme Court's decision, and is properly before this Court. *See* Pet. at 26-27.